

(26,471)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1004.

THE BRAINERD, SHALER & HALL QUARRY COMPANY,
PLAINTIFF IN ERROR,

vs.

WILSON B. BRICE, AS SOLE SURVIVING EXECUTOR OF
THE LAST WILL AND TESTAMENT OF HENRY VAN
SCHAICK, DECEASED, AND THE AMERICAN SURETY
COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Summons	1	1
Complaint	2	1
Exhibit A—Indemnity bond	16	8
Exhibit B—Agreement between Eugene Van Schalek and The Brainerd, Shaler & Hall Quarry Co., May 9, 1901...	18	9
Third amended answer of W. B. Brice.....	21	11
Exhibit A—Agreement between Henry Sybrant Van Schalek <i>et al.</i> and Henry Van Schalek, September 29, 1893.....	27	14
Third amended answer of American Surety Co.....	31	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1918.

INDEX.

	Original.	Print
Exhibit A—Release of American Surety Co.....	46	24
Exhibit B—Agreement between Henry Sybrant Van Schaick et al. and American Surety Company.....	48	25
Schedule C—Agreement between Henry Sybrant Van Schaick et al. and Henry Van Schaick, September 29, 1893.....	50	26
Exhibit D—Indemnity bond	54	29
Order of dismissal	57	31
Judgment of dismissal.....	59	31
Bill of exceptions.....	60	32
Judge's certificate	61	33
Schedule A—Order of Supreme Court of New York, Janu- ary 27, 1897, &c.....	62	33
Settlement of bill of exceptions.....	71	38
Petition for writ of error and allowance.....	73	38
Assignment of errors.....	75	39
Bond on appeal.....	76	40
Certificate as to Federal question.....	80	42
Writ of error (copy).....	82	43
Citation and service (copy).....	84	43
Stipulation as to contents of record.....	85	44
Stipulation as to record.....	86	45
Clerk's certificate	87	46
Writ of error (original).....	88	46

1 United States District Court for the Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and
Testament of Henry Van Schaick, Deceased, and The American
Surety Company of New York, Defendants.

Summons.

To the above-named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 10th day of May in the year one thousand nine hundred and sixteen.

ALEX GILCHRIST, Jr., Clerk.

George M. Brooks, Plaintiff's Attorney, Office and Post Office Address, 120 Broadway, Borough of Manhattan, New York City.

2 United States District Court for the Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and
Testament of Henry Van Schaick, Deceased, and The American
Surety Company of New York, Defendants.

Complaint.

The plaintiff above named by Geo. Murray Brooks, its attorney, complaining against the defendants above named, respectfully alleges:

I. That at all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized and existing under the laws

of the State of Connecticut, and had and has its office and principal place of business at the City of Portland in the State of Connecticut, and is a citizen and resident of the State of Connecticut, within the meaning of the laws fixing and defining the jurisdiction of the United States District Court for the Southern District of New York.

II. Upon information and belief, that the defendant, The American Surety Company of New York is a corporation organized and existing under the laws of the State of New York and has its office and place of business in the Borough of Manhattan, in the

3 City, County and State of New York, and that the defendants

Wilson B. Brice and The American Surety Company of New York are citizens and residents of the State of New York and of the Southern District of New York within the meaning of the laws fixing and defining the jurisdiction of the United States District Court for the Southern District of New York.

III. Upon information and behalf, that Jane C. Van Schaick, late of the City and County of Albany, in the State of New York, a citizen of the United States, was at the time of her death seized in fee simple and was in the actual possession of certain real property situated in the counties of Albany and Rensselar in the State of New York.

IV. Upon information and belief, that the said Jane C. Van Schaick, being so seized and possessed of the said real property, departed this life on or about the 20th day of May, 1893, having theretofore in her lifetime, to wit, on or about the 21st day of January, 1890, made and published her last will, in manner and form as required by law to pass real property within the State of New York, and that the following is a true copy of the "Fifth" clause of said will:

"Fifth. I give and devise (subject to the charges and sales as hereinbefore provided) all the real estate, lands, tenements and hereditaments which I shall own or be legally or equitably entitled to at the time of my decease, as follows, to wit: an equal undivided one-half part thereof to my cousin Henry Van Schaick of New York, for and during his life only, and the remainder in fee simple in said half part to the descendants of said Henry Van Schaick who shall be living at the time of his decease, and living also at the time of my decease, if I shall survive him; an equal undivided one-fourth part of all said real estate to the descendants who shall be living at my decease of my now deceased Cousin Eliza Bloodgood, and the remaining one undivided equal fourth part of all said real estate to the descendants, who shall be living at my decease of my now deceased cousin Mrs. Mary V. S. Oddie."

4 V. Upon information and belief, that said will was thereafter duly proved before and admitted to probate by the Surrogate's Court of Albany County, upon the 28th day of June, 1893, and duly recorded in the office of the Surrogate of said County as a will of real and personal estate, and letters testamentary thereon were, upon the said 28th day of June, 1893, duly issued by said Surrogate to Marcus T. Hun and Scott D. M. Goodwin, and they thereupon duly qualified as executors of said will.

VI. Upon information and belief, that Henry Van Schaick, the

cousin of the said testatrix, and mentioned in said will, survived her, and at the time of the commencement of the partition action herein-after mentioned, the said Henry Van Schaick had the following children living, viz: George Gray Van Schaick, Elizabeth Boutourline, Eugene Van Schaick and Henry S. Van Schaick, and that there never were any living descendants of any deceased child of the said Henry Van Schaick.

VII. Upon information and belief, that on or about the 7th day of September, 1894, by deed bearing date on that day, and recorded in the office of the Clerk of Albany County, on the 12th day of September, 1894, in Liber 463 of Deeds, at Page 403, the said Eugene Van Schaick with Sarah H. Van Schaick, his wife, granted bargained and sold to one Nathan Van Beil all his and her right, title and interest in all the real estate formerly of Jane C. Van Schaick devised by her under her will to Henry Van Schaick and to his descendants in remainder; that by deed bearing even date and recorded on the same day as the deed last above mentioned at page 406 of the same

liber, the said Nathan Van Beil granted, bargained and sold
5 all his right, title and interest in and to the same property to the said Sarah H. Van Schaick; that on or about the 9th day of June, 1896, by deed bearing date on that day, and recorded in the office of the Clerk of Albany County, on June 12th, 1896, in Liber 478 of Deeds, page 4, the said Sarah H. Van Schaick, granted, bargained and sold to Jacob A. Cantor all her right, title and interest in and to the same property, and that the interest which was acquired by the said Jacob A. Cantor in said real property by authority of the said conveyance was acquired by him subsequently to the pending of the action hereinafter mentioned for the partition of said real property, and was subject thereto, and the said Jacob A. Cantor was bound by the proceedings taken therein.

VIII. Upon information and belief, that on or about the 30th day of January, 1896, one of John Van Schaick Oddie commenced an action in the Supreme Court, in the County of Albany, against the said Henry Van Schaick, Eugene Van Schaick, Sarah H. Van Schaick and Henry S. Van Schaick and others, for the partition of the said real property formerly of Jane C. Van Schaick and devised by her under her will to the said Henry Van Schaick and others; that such proceedings were had in said action that on the 27th day of October, 1896, by an interlocutory judgment, dated on that day, it was duly ordered and adjudged by the said Court, among other things, that the said Henry Van Schaick had an estate for his own life as tenant in common in one undivided half part or moiety in the said real property; that the defendants in said action Henry S.

Van Schaick, George Gray Van Schaick, Elizabeth Boutourline
6 and Sarah H. Van Schaick, wife of Eugene Van Schaick, had equal vested estates in remainder in the one undivided half part or moiety of said real property in which the said Henry Van Schaick had an estate for his own life, the said vested remainder of each of them (except that of Sarah H. Van Schaick) being limited to commence in possession in them upon the death of the said Henry Van Schaick, if they shall survive him, and the share of each of

proper security, as hereinafter directed, for the safe keeping and
"preservation of the said sum during his life time, to the end
10 "that at his decease the same may be paid over and distrib-
"uted per stirpes among the descendants of the said
"Henry Van Schaick and the persons to whom the said share
"shall then belong, that then the said moiety of the said net pro-
"ceeds shall be immediately paid over by said Referee to the said
"Henry Van Schaick to be held by him during his life, with the full
"use of the income thereof. The security above referred to may con-
"sist of a bond to be executed by the said Henry Van Schaick as
"principal, with the American Surety Company, a corporation or-
"ganized and existing under the laws of the State of New York, as
"surety, to the descendants now living of the said Henry Van
"Schaick, who are parties to this action, and to such other descend-
"ants of the said Henry Van Schaick as shall survive him, and to
"such other persons as shall be entitled, upon the death of the said
"Henry Van Schaick to receive any portion of the share of the said
"proceeds in which he has a life interest. The said bond to be in the
"penal sum of seventy-five thousand dollars (\$75,000), and to be
"void if the said Henry Van Schaick shall, during his life time,
"safely keep and preserve the principal of said share of said net
"proceeds, and the said bond shall after its execution and before the
"filing thereof, be approved by a Justice of this Court, and upon such
"approval being given the same shall be filed in the office of the
"Clerk of Albany County. The said last mentioned one-half of said
"net proceeds shall include and comprise the sum of thirty-eight
"thousand and thirty-nine dollars and eighty-seven cents (\$38,-
"039.87) in cash, and also the four remaining mortgages, and the

11 "bonds accompanying the same, executed to said Referee by
"the purchasers other than the said John Hoy, said four
"bonds and mortgages representing the aggregate sum of
"twenty-nine thousand one hundred and forty-five dollars (\$29,145)
"of the purchase money, and which said bonds and mortgages shall,
"for the purpose of this distribution, be regarded as equivalent to
"cash for the amounts secured to be paid by them respectively."

That thereafter the said Henry Van Schaick as principal and the defendant The American Surety Company of New York as surety duly made their joint and several bond in the sum of seventy-five thousand Dollars, bearing date the 3rd day of February, 1897, re-
citing the decree of distribution aforesaid, bearing date the 1st day of February, 1897, and entered the 2nd day of February, 1897, and conditioned that if the said Henry Van Schaick should during his life time safely keep and preserve the principal of said sixty-seven thousand one hundred and eighty-four dollars and eighty-seven cents, and if such sum of \$67,184.87 should thereafter be duly ac-
counted for and paid to his descendants, as provided for in the de-
cree aforementioned, then said obligation to be void, else to remain in full force, virtue and effect; that said bond was thereafter duly ap-
proved by a Justice of said Court and was thereupon filed in the office of the Clerk of Albany County; that thereupon the said moiety of said net proceeds, to wit: the sum of \$67,184.87 was paid over by

said Referee to the said Henry Van Schaick to be held by him during his life, with full use of the income thereof, and that a true copy of said bond is hereto annexed, marked A, and made a part hereof as if fully set forth herein.

12 IX. Upon information and belief, that on or about the 21st day of April, 1898, by deed bearing date on that day, the said Jacob A. Cantor and Lydia G. Cantor, his wife, granted, bargained, sold, released and assigned to the said Eugene Van Schaick all the right, title and interest of the said Jacob A. Cantor in all the said property formerly of said Jane C. Van Schaick, and of, in and to the proceeds thereof hereinbefore mentioned, and including all the interest and rights which were acquired by the said Jacob A. Cantor under and by authority of the conveyance hereinbefore mentioned from the said Sarah H. Van Schaick.

X. That on or about the 9th day of May, 1901, by deed bearing date on that day, the said Eugene Van Schaick for a valuable consideration, duly bargained, sold, assigned, transferred, granted, released and conveyed to the plaintiff, its successors and assigns forever, the sum of twenty thousand dollars to be payable out of the interest of the said Eugene Van Schaick in the proceeds of the sale of the real estate hereinbefore mentioned, then in the hands of the said Henry Van Schaick as aforesaid, together with all the right, title and interest of the said Eugene Van Schaick in and to said remainder up to the sum of twenty thousand Dollars aforesaid at the time of the vesting of said remainder in possession upon the death of the said Henry Van Schaick; and that a true copy of said last mentioned deed is hereto annexed and marked B, and made a part hereof as if fully set forth herein.

XI. Upon information and belief, that the said Henry S. Van Schaick died prior to the death of the said Henry Van Schaick, and left no descendants him surviving.

13 XII. Upon information and belief, that the said Henry Van Schaick died on or about the 15th day of November, 1914, leaving him surviving his children, the said George Gray Van Schaick, Elizabeth Boutourline and Eugene Van Schaick and no other living descendant.

XIII. Upon information and belief, that letters testamentary upon the estate of the said Henry Van Schaick were upon the 25th day of June, 1915, duly issued by the Surrogate's Court of New York County to the said Eugene Van Schaick and the defendant Wilson B. Brice and they thereupon duly qualified as executors of the will of the said Henry Van Schaick, deceased.

XIV. Upon information and belief, that the said Eugene Van Schaick died on or about the 27th day of January, 1916.

XV. Upon information and belief, that the said Henry Van Schaick, did not, during his life time, safely keep or preserve the principal of said sixty-seven thousand one hundred and eighty four dollars and eighty-seven cents, mentioned in the condition of the said bond, Exhibit A, and that such sum of \$67,184.87 has not been accounted for and has not been paid nor has any part thereof been paid to his descendants or to the persons to whom the same belongs,

as provided for in the decree mentioned in the said bond; that prior to the death of the said Henry Van Schaick the said sum of \$67,184.87 had been wholly lost; that since the death of the said Henry Van Schaick and before the commencement of this action the plaintiff 14 duly demanded from the defendant Wilson B. Brice, as sole surviving executor of the estate of the said Henry Van Schaick, deceased, the payment of the said sum of twenty thousand dollars assigned to it as aforesaid, and that no part thereof has been paid.

Wherefore, the plaintiff demands judgment against the defendants for the sum of twenty thousand dollars with interest thereon from November 15, 1914, besides the costs and disbursements of this action.

GEO. MURRAY BROOKS,
Attorney for Plaintiff.

120 Broadway, New York, N. Y.

15 STATE OF NEW YORK,
County of New York, ss:

Frederick De Peyster, being duly *duly* sworn, says: That he is the agent and General Manager of The Brainerd, Shaler & Hall Quarry Company, the plaintiff above named; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. That the reason why this verification is not made by the plaintiff is because the plaintiff is a foreign corporation and that the grounds of deponent's belief as to all matters not stated upon his own knowledge, are information derived from an examination of the papers mentioned in the complaint and statements made to deponent by Eugene Van Schaick and Geo. Murray Brooks.

Sworn to before me this — day of April, 1916.

16

EXHIBIT A.

Know all men by these presents.

That we, Henry Van Schaick, of No. 40 West Thirty-fourth Street, in the City of New York, as principal, and the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, in the City of New York, as surety, are held and firmly bound unto such descendants of the said Henry Van Schaick as shall be living at the time of his death, in the sum of seventh-five thousand dollars (\$75,000) lawful money of the United States, to be paid to them, their executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the third day of February, in the year one thousand eight hundred and ninety-seven.

Whereas, by a decree of distribution entered on the 2nd day of February, 1897, in the County of Albany in an action for the partition for certain real estate, wherein John Van Schaick Oddie is plaintiff and said Henry Van Schaick and others are defendants, it is provided among other things that one-half of the net proceeds of such property sold in the said partition suit, which one-half amounts to sixty-seven thousand, one hundred and eighty-four dollars and eighty-seven cents (\$67,184.87) is adjudged to belong to said above bounden Henry Van Schaick for and during the term of his natural life, and that at the time of his death the said share shall pass to and vest absolutely in such of the descendants of said Henry Van Schaick as shall then be living.

17 Now, therefore, the condition of this obligation is such that if the above bounden Henry Van Schaik, shall, during his lifetime, safely keep and preserve the principal of said Sixty-seven thousand, one hundred and eighty-four dollars and eighty-seven cents (\$67,184.87) and if such sum of \$67,184.87 shall thereafter be duly accounted for and paid to his descendants, as provided for in the decree aforementioned, then this obligation is to be void; else to remain in full force, virtue and effect.

HENRY VAN SCHAICK.
AMERICAN SURETY COMPANY OF NEW
YORK,
By W. L. TRENIHOLM, *President.*
CORTLANDT S. VAN RENNSLEAR,
Attorney.

Sealed and delivered in the presence of:

[SEAL] WILLIAM A. BOECKEL as to H. Van Schaick.

18

EXHIBIT B.

This indenture, made the 9th day of May, in the year one thousand nine hundred and one, between Eugene Van Schaick, of the City of New York, party of the first part, and The Brainerd, Shaler and Hall Quarry Company, a corporation duly organized and existing under the laws of the State of Connecticut, party of the second part:

Whereas, Henry Van Schaick, the father of the said party of the first part, holds for the term of his natural life the sum of sixty-seven thousand one hundred and eighty-four dollars and eighty-seven cents, being the proceeds of the sale in partition of certain lands and premises whereof an equal undivided one-half part was devised by the will of Jane C. Van Schaick, deceased, to the said Henry Van Schaick for and during the term of his natural life, and the remainder in fee simple to the descendants of the said Henry Van Schaick, living at the time of his decease, which sum was paid over to the said Henry Van Schaick pursuant to a decree of distribution, bearing date the 1st day of February 1897, and entered on the 2nd day of February, 1897, in the County of Albany, in an action for the partition of said real estate, wherein John Van Schaick Oddie was plaintiff and said Henry

Van Schaick and others were defendants; and whereas the reversion and remainder of an equal undivided one-third part of said sum of sixty-seven thousand one hundred and eighty-four dollars and eighty-seven cents belongs to the said party of the first part, and is now vested in said party of the first part, subject, however, to be divested by his death occurring before the death of the said Henry Van Schaick;

19 Now, therefore, this indenture witnesseth, that the said party of the first part, in consideration of one dollar lawful money of the United States, and other good and valuable considerations, paid by the party of the second part, does hereby bargain, sell, assign, transfer, set over, grant, release and convey unto the said party of the second part, its successors and assigns forever, the sum of twenty thousand dollars to be payable out of the said one-third interest of the said party of the first part in the said proceeds of the sale of the said real estate now in the hands of the said Henry Van Schaick as aforesaid, together with all the right, title and interest of the said party of the first part in and to said remainder up to the sum of twenty thousand dollars aforesaid at the time of the vesting of said remainder in possession upon the death of the said Henry Van Schaick.

To have and to hold, the above granted and assigned property an undivided right and interest in said remainder unto the said party of the second part, its successors and assigns forever.

And the said party of the first part does covenant with the said party of the second part, as follows: that the said party of the first part is lawfully vested in his own right of a good, absolute and indefeasible estate in remainder in an undivided one-third part of the said sum of sixty-seven thousand one hundred eighty-four dollars and eighty-seven cents, to vest in possession immediately from and after the decease of the said Henry Van Schaick; that the interest of the said party of the first part in said remainder now is and immediately from and after the decease of the said Henry Van

20 Schaick shall be free from all encumbrances in case the said party of the first part shall survive the said Henry Van Schaick; that the said party of the first part has good right, full power and lawful authority to convey the same as aforesaid that the said party of the first part will execute or procure any further or necessary assurance of the title to the undivided interest in said remainder hereby granted and assigned; and that after the decease of the said Henry Van Schaick, the said party of the first part will warrant and defend the above granted and assigned undivided interest and sum of money to the said party of the second part, its successors and assigns forever, against the lawful demands of all persons.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

EUGENE VAN SCHACK. [SEAL.]

In the presence of

C. G. SMITH.

GEORGE M. BROOKS.

COUNTY OF NEW YORK, ss:

On this 11th day of May, in the year one thousand nine hundred and one, before me personally appeared Eugene Van Schaick, to me known and known to me to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

C. G. SMITH,
Notary Public, N. Y. Co.

21 United States District Court for the Southern District of New York.

L. 15-239.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Third Amended Answer of Defendant Wilson B. Brice, as Sole Surviving Executor, etc.

The above named defendant Wilson B. Brice, as sole surviving executor of the last Will and Testament of Henry Van Schaick, deceased, by Wilson B. Brice, his attorney, for this his third amended answer to the complaint of the plaintiff, alleges:

First. He denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs of the complaint numbered I, III, IV, V, VI, VII, VIII, IX, X, and XI.

Second. This defendant admits that prior to the commencement of this action, plaintiff demanded from this defendant as sole surviving executor of the estate of Henry Van Schaick, payment of the sum of Twenty Thousand Dollars (\$20,000.) as alleged in Paragraph XV of the complaint and that this defendant has paid no part thereof. And this defendant denies on information and belief, the truth of each and every other allegation in said Paragraph XV in the complaint contained.

Further answering, and as a first separate defense, defendant alleges:

Third. On information and belief, that prior to the death 22 of Henry Van Schaick, Eugene Van Schaick assumed the management of certain property of the said Henry Van Schaick, including the property mentioned in the bond (Exhibit A annexed to the complaint); that if said property was dissipated or lost at the death of the said Henry Van Schaick as alleged in the

complaint, it was so dissipated and lost with the consent of and with the connivance of and through the affirmative acts of the said Eugene Van Schaick, and the said Eugene Van Schaick was fully cognizant of and consented to any and all acts by which said property was so dissipated or lost.

Further answering and as a second separate defense, defendant alleges:

Fourth. On information and belief, that prior to the death of the said Henry Van Schaick, he paid over to the said Eugene Van Schaick any moneys to which the said Eugene Van Schaick was then entitled, or might thereafter become entitled, in the manner set forth in Paragraphs IV and VIII of the complaint.

Further answering and as a third separate defense and set off, defendant alleges:

Fifth. On information and belief, that at the time of the death of the said Henry Van Schaick, the said Eugene Van Schaick was indebted to the said Henry Van Schaick and still is indebted to the estate of the said Henry Van Schaick in a sum amounting to more than Twenty thousand Dollars (\$20,000.), arising from moneys loaned by the said Henry Van Schaick to the said Eugene Van Schaick, and for moneys and property of the said Henry Van Schaick appropriated by the said Eugene Van Schaick to his own use.

Further answering and as a fourth separate defense, defendant alleges:

Sixth. On information and belief that prior to the 9th
23 day of May 1901 and on or about the 29th day of September
1893, the said Eugene Van Schaick and Sarah Howland Van Schaick, his wife, Henry Sybrant Van Schaick and Ada Davies Van Schaick, his wife, George Gray Van Schaick then unmarried, and the Countess Elise Bourtourline (nee Van Schaick) and Count Alexandre Bourtourline, her husband, executed and delivered to defendant's testator, a written assignment wherein and whereby they remised and released to defendant's testator, his heirs and assigns forever, all their right, title and interest in and to the real estate lands, tenements and hereditaments which were formerly of the said Jane C. Van Schaick late of the City of Albany, New York, deceased; which said instrument was recorded in the office of the Clerk of Albany County, New York, where most of said real estate was situated, on the 21st day of November 1916, in book 658 of Deeds, page 337, and also in the office of the Clerk of Rensselaer County, New York, where the rest of said real estate was situated in the 21st day of November 1916, and also in the office of the Surrogate of Albany County, New York, where the Will of the said Jane C. Van Schaick was probated, on the 21st day of November 1916; and that a true copy of said instrument is hereto annexed and marked Exhibit A and made a part hereof as if fully set forth herein.

Further answering and as a fifth separate and partial defense, defendant alleges:

Seventh. Upon information and belief, that, at the time of the alleged delivery of the instrument dated May 9, 1901 described in Paragraph X of the complaint, and as part of the same transaction, the said Eugene Van Schaick, as principal, and a corporation known as the Union Surety & Guaranty Company, as surety, executed and delivered to the plaintiff a bond, a true copy of

which is hereto annexed and marked Exhibit "D." That at the same time and as part of the same transaction the said Eugene Van Schaick delivered to the plaintiff five policies of Life insurance belonging to the said Van Schaick, which he had taken out on his own life and in his own name on or about June 15, 1898, in the Provident Savings Life Assurance Society of New York, being policies numbers 92981, 92982, 92983, 92984 and 92985 for \$3,000. each, all dated June 15, 1898, as security for the payment of the alleged interest in the Estate of Jane C. Van Schaick up to the sum of \$20,000. referred to in the instrument dated May 9, 1901, described in paragraph X of the complaint. That the said Eugene Van Schaick died on or about the 27th day of January, 1916, and that on or about the 21st day of February, 1916, the plaintiff received upon said life insurance policies from the Postal Life Insurance Company of New York, the successor of the said Provident Savings Life Assurance Society, the sum of \$14,934.15. That upon these policies the plaintiff claims to have paid premiums which, with interest, amounted on February 21, 1916, to \$5,871.83, leaving the sum of \$9,062.32 as the net amount received by the said plaintiff in respect to said policies.

Eighth. This defendant avers that he is entitled to set off the said sum of \$9,062.32 so received by the plaintiff against all claims of the plaintiff against this defendant as alleged in the complaint.

25 Wherefore, this defendant demands judgment that the complaint be dismissed with costs.

WILSON B. BRICE,
Attorney for Wilson B. Brice, as Sole
Surviving Executor, etc., Defendant.

27 Cedar Street, New York City.

26 SOUTHERN DISTRICT OF NEW YORK,
State and County of New York, ss:

Wilson B. Brice, being duly sworn, says: That he is the defendant named herein. That he has read the foregoing amended answer and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters, he believes it to be true.

WILSON B. BRICE.

Sworn to before me this 8th day of January, 1917.

MAE HAFT,

Notary Public, Bronx Co. No. 2; Bronx Register No. 820.

Certificate filed in N. Y. Co. No. 162 N. Y. Register No. 8180.
Term expires Mar. 30, 1918.

EXHIBIT A.

This indenture made this 29th day of September, in the year one thousand eight hundred and ninety-three, between Henry Sybrant Van Schaick, of the City of New York, and Ada Davies Van Schaick, his wife, George Gray Van Schaick, unmarried, of the City of New York, Countess Elise Boutourline (nee Van Schaick) of Florence, Italy, and Count Alexandre Boutourline, her husband, and Eugene Van Schaick, of the City of New York, and Sarah Howland Van Schaick, his wife, parties of the first part and Henry Van Schaick, of the City, County and State of New York, party of the second part:

Whereas under the last will and testament of Jane C. Van Schaick, late of the City of Albany, the party of the second part was given and devised one-half of all her real estate, lands, tenements and hereditaments which she owned or should be legally or equitably entitled to at the time of her decease, for and during the life of the said party of the second part only, and the remainder in fee simple in said half part to the descendants of the said party of the second part who shall be living at the time of her decease; and

Whereas it is deemed beneficial to the said property that it be held in fee simple, and the parties of the first part are desirous of relinquishing, conveying and assigning their vested remainder in and to said property to the party of the second part, so as to give him title in fee simple to the said property, instead of a life estate;

Now, therefore, this indenture witnesseth:

That in consideration of the premises, and of the sum of
28 One Dollar by the party of the second part to the parties of the first part in hand paid, the receipt whereof is hereby confessed and acknowledged, the parties of the first part do hereby grant, remise and release to the party of the second part all their right, title and interest in and to the real estate, lands, tenements and hereditaments which were of said Jane C. Van Schaick, late of the City of Albany, together with the appurtenances, and all the estate and rights of the said parties of the first part, to have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

And the said parties of the first part do covenant with the said party of the second part that they will execute or procure any further necessary assurance of the title to said premises.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

HENRY SYBRANT VAN SCHAIK,	[L. S.]
ADA DAVIES VAN SCHAIK,	[L. S.]
GEORGE GRAY VAN SCHAIK.	[L. S.]

Signed, sealed and delivered in the presence of
WILLIAM A. BOECKEL,

As to Henry Sybrant Van Schaick, Ada Davies Van Schaick, George Gray Van Schaick, Eugene Van Schaick and Sarah Howland Van Schaick.

G. G. VAN SCHAICK, as to

CTESSE. ELISABETH BOUTOURLINE. [L. s.]

and

COMTE. ALEXANDRE BOUTOURLINE. [L. s.]

EUGENE VAN SCHAICK. [L. s.]

SARAH HOWLAND VAN SCHAICK. [L. s.]

29 **STATE OF NEW YORK,**
City and County of New York, ss:

On this 29th day of September, 1893, before me personally came Henry Sybrant Van Schaick and Ada Davies Van Schaick, his wife, George Gray Van Schaick, Eugene Van Schaick and Sarah Howland Van Schaick, his wife, to me known and known to me to be the persons above named and who executed the above instrument, and duly, separately, personally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

Form 2.

STATE OF NEW YORK,
County of New York, ss:

No. 8723.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That William A. Boeckel whose name is subscribed to the deposition or certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgement, a Notary Public, acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature of said deposition, or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 7 day of April, 1915.
WM. F. SCHNEIDER, Clerk.

Cancelled 10c. Fed. Stamp affixed Apr. 7, 1915.

30 KINGDOM OF ITALY,
City of Florence, ss:

On this the 15th day of December, A. D. 1893, before me James Verner Long, U. S. Consul at Florence, personally appeared Countess Elisabeth Bourtourline and Count Alexandre Bourtourline, her husband, known to me and known to me to be the persons described in and who executed the within Instrument and acknowledged personally, duly, separately to me that they executed the same for the uses and to the purposes therein mentioned.

Given under my hand and Consular Seal the day and year aforesaid.

[CONSULAR SEAL.]

JAMES VERNER LONG,
U. S. Consul at Florence, Italy.

31 United States District Court for the Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and the American Surety Company of New York.

Third Amended Answer.

The defendant, American Surety Company of New York, by Winthrop & Stimson, its attorneys, for a third amended answer to the complaint herein, alleges:

First Defense.

I. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph I of the complaint.

II. This defendant admits that the defendant American Surety Company of New York is a corporation organized and existing under the laws of the State of New York and having its principal place of business in the Borough of Manhattan, City, County and State of New York, and of the Southern District of New York. This defendant denies any knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph II of the complaint.

III. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph III of the complaint.

32 IV. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph IV of the complaint.

V. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph V of the complaint.

VI. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph VI of the complaint.

VII. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph VII of the complaint.

VIII. This defendant admits that on or about February 2, 1897, there was entered a decree of distribution in the Supreme Court, in the County of Albany, in an action for a partition of certain real estate wherein John Van Schaick Oddie was plaintiff and Henry Van Schaick and others were defendants. For the contents of said decree this defendant refers to the original thereof or a duly certified copy to be produced upon the trial of this action.

This defendant admits that Henry Van Schaick, as principal, and the defendant the American Surety Company of New York, as surety, executed a bond in the sum of \$75,000, bearing date the 3rd day of February, 1897, substantially in the form a copy of which is annexed to the complaint, but for greater certainty and for the contents and effect thereof, this defendant refers to the original thereof to be produced upon the trial of this action.

Defendant denies any knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph VIII of the complaint.

IX. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph IX of the complaint.

X. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph X of the complaint.

XI. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XI of the complaint.

XII. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XII of the complaint.

XIII. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XIII of the complaint.

XIV. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XIV of the complaint.

XV. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XV of the complaint.

Second Defense.

34 XVI. This defendant alleges that simultaneously with the execution and delivery of the bond mentioned in paragraph VIII of the complaint by Henry Van Schaick, as principal, and by this defendant as surety, and in consideration thereof, and as a part of the same transaction, Eugene Van Schaick, Henry Sybrant Van Schaick and George Gray Van Schaick executed and delivered to the defendant American Surety Company of New York an instrument a copy of which is hereto annexed marked Exhibit "A" and made a part hereof as fully as though set forth at length herein.

Third Defense.

XVII. This defendant alleges that on or about the 4th day of February, 1897, Eugene Van Schaick, being as this defendant is informed and believes, the beneficial owner of the remainder interest bequeathed to him under the will of Jane C. Van Schaick in the property mentioned in the bond (Exhibit "A" annexed to the complaint), for a valuable consideration, executed and delivered to this defendant a release of all its liability to him, the said Eugene Van Schaick, in respect to its suretymship on the said bond (Exhibit "A" annexed to the complaint). A copy of said release is annexed hereto marked Schedule "A" with the same force and effect as if herein set forth at length.

XVIII. This defendant alleges, upon information and belief, that the assignment alleged to have been made by Eugene Van Schaick to the plaintiff, as alleged in paragraph X of the complaint, was never recorded in the office of the clerk of Albany County and was never recorded in the office of the Clerk of Rensselaer County, those being the counties in which the real estate, the proceeds of which are alleged to have constituted the fund referred to in the bond 35 (Exhibit "A" attached to the complaint) is alleged to have been situated, and was never recorded in the office of the Surrogate's Court of Albany County, by which letters testamentary had been issued on the estate of Jane C. Van Schaick, and that the plaintiff did not at any time notify the said Henry Van Schaick of the said assignment from Eugene Van Schaick to the plaintiff and that said Henry Van Schaick had no knowledge of said assignment.

This defendant further alleges that the plaintiff did not in any way notify this defendant at any time prior to the 9th day of October, 1915, of the assignment from said Eugene Van Schaick to the plaintiff alleged in paragraph X of the complaint, and that this defendant, prior to said 9th day of October, 1915, did not have any notice of said assignment from the plaintiff or from any other person, or any knowledge that the plaintiff claimed any interest in the estate of

Jane C. Van Schaick, or in the share of Eugene Van Schaick therein, by reason of said assignment alleged in paragraph X of the complaint.

Fourth Defense and Set Off.

XIX. This defendant alleges that on or about the 25th day of March, 1897, for a good and valuable consideration, Eugene Van Schaick, Henry Sybrant Van Schaick and George Gray Van Schaick executed and delivered to this defendant a certain instrument bearing date on that day. In and by said instrument said Eugene Van Schaick, Henry Sybrant Van Schaick and George Gray Van Schaick covenanted and agreed with said American Surety Company as follows:

"That said parties shall and will at all times indemnify, and keep indemnified, and save harmless the said Company from and against all loss, damages, costs, charges, counsel fees and expense whatsoever which said Company shall or may, for any cause, at any time sustain or incur by reason or in consequence of said company having executed said instrument; and do further covenant and agree to pay to said Company and its representatives all damages for which said Company or its representatives shall become responsible upon the said bond before said Company or its representatives shall be compelled to pay the same, any sum so paid, however, to be applied to the payment of such damages; and in case any suit, action, or other proceeding shall be commenced or notice served on said parties of the first part in any manner relating to or growing out of the matter or business for or on account of which the aforesaid instrument was required to be executed, immediate notice thereof shall be given to said Company at its office in New York."

A full copy of said instrument is hereto annexed marked Exhibit "B" and made a part hereof as fully as though set forth at length herein.

XX. This defendant alleges that said agreement (Exhibit "B") now is and was in all respects valid and subsisting at the time of the alleged assignment from Eugene Van Schaick to this plaintiff alleged in paragraph X of the complaint.

XXI. This defendant repeats and re-alleges the allegations contained in paragraph 18 of this answer with the same force and effect as if the same had been made a portion of this defense.

XXII. This defendant avers that it is entitled to set off against any claim of the plaintiff as assignee of Eugene Van Schaick under the assignment alleged in paragraph X of the complaint, its claim against Eugene Van Schaick under the said agreement dated March 25, 1897.

Fifth Defense.

37 XXIII. This defendant alleges that at the time of the execution and delivery by it of the bond (Exhibit "A" annexed to the complaint) the said Eugene Van Schaick represented

to this defendant that he, as one of the children of Henry Van Schaick was entitled to an interest in remainder (Subject to being divested in case of his death before the death of said Henry Van Schaick) in the property mentioned in said bond.

XXIV. This defendant alleges that if it be determined contrary to the information and belief of this defendant that Eugene Van Schaick was not the beneficial owner of the remainder interest bequeathed to him under the will of Jane C. Van Schaick in the property mentioned in the bond (Exhibit "A" annexed to the complaint) at the time of the execution and delivery of said bond, then said representations so made to this defendant were made by said Eugene Van Schaick falsely and fraud-lently and for the purpose of inducing this defendant to rely on them and to execute the said bond, and the said Eugene Van Schaick fraudulently concealed from this defendant that he had made any assignment to his wife Sarah Van Schaick as alleged in paragraph VII of the Complaint or to any other person, and this defendant relying on said representations of said Eugene Van Schaick accepted the release executed by said Eugene Van Schaick, dated February 4, 1897 (a copy of which is annexed to this answer as Exhibit "A") and executed and delivered the said bond (Exhibit "A" annexed to the complaint).

XXV. This defendant repeats and realleges the allegations in paragraph XVIII of this answer with the same force and effect as if set forth at length as a part of this defense.

XXVI. This defendant alleges that at the time of the execution and delivery by it of the bond (Exhibit "A" annexed to the complaint) and at the time of the execution and delivery of the said release (Exhibit "A" hereto annexed) and at the time of the execution and delivery of the said Indemnity Agreement (Exhibit "A" hereto annexed) the said Eugene Van Schaick represented to this defendant that he, as one of the children of Henry Van Schaick was entitled to an interest in remainder (Subject to being divested in case of his death before the death of said Henry Van Schaick) in the property mentioned in said bond.

XXVII. This defendant alleges that if it be determined contrary to the information and belief of this defendant that Eugene Van Schaick was not the beneficial owner of the remainder interest bequeathed to him under the will of Jane C. Van Schaick in the property mentioned in the bond (Exhibit "A" annexed to the complaint) at the time of the execution and delivery of said bond, then said representations so made to this defendant were made by said Eugene Van Schaick falsely and fraudulently and for the purpose of inducing this defendant to rely upon them and to permit the said Henry Van Schaick until his death to have full and sole control of the property mentioned in said bond (Exhibit "A" annexed to complaint) and to omit to insist on and demand as it was its custom in similar cases joint control with the said Henry Van Schaick

of the property mentioned in said bond as a condition of the issuance of its bond and the continuance of its liability thereunder, and the said Eugene Van Schaick fraudulently concealed from this defendant that he had made any assignment to
39 his wife Sarah Van Schaick as alleged in paragraph VII of the complaint or to any other person, and this defendant relying on said representations of said Eugene Van Schaick accepted the release executed by said Eugene Van Schaick, dated February 4, 1897 (a copy of which is annexed to this answer as Exhibit "A") and accepted the indemnity agreement executed by said Eugene Van Schaick, dated March 25, 1897, (a copy of which is annexed to this answer as Exhibit "B") and relying on said representations and on said agreements, this defendant permitted the said Henry Van Schaick until his death to have full and sole control of the property mentioned in said bond (Exhibit "A" annexed to the complaint) and omitted to insist on and demand, as it was its custom in similar cases, joint control jointly with the said Henry Van Schaick of the property mentioned in said bond as a condition of the issuance of its bond and the continuance of its liability thereunder.

XVIII. This defendant repeats and realleges the allegations contained in paragraph XVIII of this answer with the same force and effect as if set forth at length as a part of this defense.

Seventh Defense.

XXIX. This defendant alleges, on information and belief, that prior to the death of Henry Van Schaick the said Eugene Van Schaick assumed the management of certain property of his father, the said Henry Van Schaick, including the property mentioned in the bond (Exhibit "A" annexed to the complaint): that if the said property was dissipated or lost at the death of said Henry Van Schaick, as alleged in said complaint, it was so dissipated
40 and lost with the consent of and with the connivance of and through the affirmative acts of the said Eugene Van Schaick and the said Eugene Van Schaick was fully cognizant of and consented to any and all acts by which said property mentioned in the bond (Exhibit "A" annexed to the complaint) was so dissipated or lost.

XXX. This defendant repeats and realleges the allegation contained in paragraph XVIII of this answer with the same force and effect as if set forth in full as a part of this defense.

Eighth Defense.

XXXI. This defendant alleges, upon information and belief, that said Henry Van Schaick, during his lifetime, accounted to the said Eugene Van Schaick for the property mentioned in the bond (Exhibit "A" annexed to the complaint) and transferred and paid over to the said Eugene Van Schaick the portion of said property to

which the said Eugene Van Schaick was entitled or which the said Eugene Van Schaick or his assigns would otherwise have become entitled under the terms of the decree of distribution mentioned in said bond, to receive upon the death of the said Henry Van Schaick.

XXXII. This defendant repeats and realleges the allegations contained in paragraph XVIII of this answer with the same force and effect as if set forth at length as a part of this defense.

41

Ninth Defense.

XXXIII. This defendant alleges upon information and belief that Henry Van Schaick, prior to his death, loaned to the said Eugene Van Schaick sums of money in excess of \$20,000 and that the said Eugene Van Schaick appropriated to his own use moneys and property of the said Henry Van Schaick in excess of \$20,000 and that at the time of the death of said Henry Van Schaick the said Eugene Van Schaick was indebted to the said Henry Van Schaick and still is indebted to the estate of said Henry Van Schaick in a sum amounting to more than \$20,000.

XXXIV. This defendant repeats and realleges the allegations contained in paragraph XVIII of this answer with the same force and effect as if set forth at length, as a part of this defense.

Tenth Defense.

XXXV. Upon information and belief, this defendant denies the allegations contained in paragraph VII of the complaint.

XXXVI. Upon information and belief, this defendant denies the allegations of paragraphs IX and X of the complaint.

XXXVII. This defendant alleges upon information and belief that, on or about the 29th day of September, 1893, by deed bearing date on that day, the said Eugene Van Schaick and Sarah Howland Van Schaick, his wife, and Henry Sybrant Van Schaick and Ada Davies Van Schaick, his wife, George Gray Van Schaick, then unmarried, and the Countess Elise Boutourline (née Van Schaick) and Count Alexandre Boutourline, her husband, for

42 a valuable consideration duly granted, remised and released to Henry Van Schaick, his heirs and assigns, forever, all their right, title and interest in and to the real estate, lands, tenements and hereditaments which were formerly of the said Jane C. Van Schaick, late of the City of Albany, New York, deceased; that said deed was duly recorded in the clerk's office of Albany County, New York, where most of said real estate was situated, on the 21st day of November, 1916, in book 658 of deeds, page 337, and in the clerk's office of Rensselaer County, New York, where the rest of said real estate was situated, on the 21st day of November, 1916, and in the office of the Surrogate of Albany County, New York, where the will of the said Jane C. Van Schaick was probated, on the 21st day of November, 1916, and that a true copy of said last mentioned deed is hereto annexed and marked Exhibit "C" and made a part hereof as if fully set forth herein.

XXXVIII. This defendant repeats and realleges the allegations contained in paragraph XVIII of this answer with the same force and effect as if set forth at length as a part of this defense.

Eleventh and Partial Defense.

XXXIX. This defendant repeats and realleges the allegations in Paragraph XIX of this answer with the same force and effect as if the same had been made a portion of this defense.

XL. This defendant alleges, upon information and belief, that, at the time of the alleged delivery of the instrument dated May 9, 1901, described in Paragraph X of the complaint, and as part 43 of the same transaction, the said Eugene Van Schaick, as principal, and a corporation known as the Union Security & Guaranty Company, as surety, executed and delivered to the plaintiff a bond, a true copy of which is hereto annexed and marked Exhibit "D." That at the same time and as part of the same transaction the said Eugene Van Schaick delivered to the plaintiff five policies of life insurance belonging to the said Van Schaick, which he had taken out on his own life and in his own name on or about June 15, 1898, in the Provident Savings Life Assurance Society of New York, being policies numbers 92981, 92982, 92983, 92984 and 92985 for \$3,000 each, all dated June 15, 1898, as security for the payment of the alleged interest in the Estate of Jane C. Van Schaick up to the sum of \$20,000 referred to in the instrument dated May 9, 1901, described in paragraph X of the complaint and in Exhibit "D" hereto annexed. That the said Eugene Van Schaick died on or about the 27th day of January, 1916, and that on or about the 21st day of February, 1916, the plaintiff received upon said life insurance policies from the Postal Life Insurance Company of New York, the successor of the said Provident Savings Life Assurance Society, the sum of \$14,934.15. That upon these policies the plaintiff claims to have paid premiums which, with interest, amounted on February 21, 1916, to \$5,871.83, leaving the sum of \$9,062.32 as the net amount received by the said plaintiff in respect to said policies.

XLI. This defendant avers that it is entitled to set off the said 44 sum of \$9,062.32 so received by the plaintiff against all claims of the plaintiff against this defendant by reason of this defendant's bond dated the 3rd day of February, 1897, referred to in the complaint herein.

Wherefore, this defendant demands that the complaint herein be dismissed with costs.

WINTHROP & STIMSON,
*Attorneys for Defendant American
Surety Company of New York.*

Office & Post Office Address: 32 Liberty Street, Borough of Manhattan, New York City, N. Y.

45 STATE OF NEW YORK,
County of New York, ss:

E. F. Watson, being duly sworn, deposes and says: that he is the Vice-President of the American Surety Company of New York, the defendant in this action; that he has read the foregoing amended answer and knows the contents thereof and that the same is true to his knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the defendant is that it is a corporation; that this defendant is an officer thereof, to wit: the Vice-President, and that he is familiar with all the facts set forth in the answer; that the ground of his belief as to all matters not stated upon his knowledge is information which he has acquired in the course of the performance of his duties as Vice-President of the said American Surety Company of New York.

E. F. WATSON.

Sworn to before me this 5th day of January, 1917.

HORACE P. HOLLISTER,
Notary Public, Westchester County.

Certificate filed in New York County. New York County No. 167.
New York Register's No. 7166.

My Commissioner expires March 30, 1917.

46

EXHIBIT "A."

To All to Whom These Presents Shall Come or May Concern, Greeting:

Know ye, that we, Henry Sybrant Van Schaick, George Gray Van Schaick & Eugene Van Schaick for and in consideration of the sum of One Dollar lawful money of the United States of America, to us in hand paid by The American Surety Company, the receipt whereof is hereby acknowledged, have remised, released and forever discharged, and by these Presents do for ourselves, our heirs, executors and administrators, remise, release and forever discharge the said The American Surety Company, its successors and assigns, of and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against The American Surety Company we ever had, now have or which heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing what-

soever from the beginning of the world to the day of the date of these presents & more particularly because of their suretyship on the bond of Henry Van Schaick as life-tenant of certain property taken under the last will and testament of Jane C. Van Schaick, deceased.

In witness whereof, we have hereunto set our hands and seals the 4th day of February in the year of our Lord one thousand eight hundred and ninety-seven.

HENRY SYBRANT VAN SCHAICK. [L. s.]

GEORGE GRAY VAN SCHAICK. [L. s.]

EUGENE VAN SCHAICK. [L. s.]

Sealed and Delivered in the Presence of
WILLIAM A. BOECKEL.

47 STATE OF NEW YORK,
City of New York,
County of New York, ss:

On this 4 day of February in the year one thousand eight hundred and ninety-seven before me personally came Henry Sybrant Van Schaick, George Gray Van Schaick and Eugene Van Schaick to me known, and known to me to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same.

WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

48 EXHIBIT "B."

This Agreement, made this 25th day of March, in the year one thousand eight hundred and ninety-seven, by and between Henry Sybrant Van Schaick, George Gray Van Schaick, Eugene Van Schaick, parties of the first part, and the American Surety Company of New York, party of the second part, witnesseth:

Whereas, at the special instance and request of the parties of the first part, and on the security hereof, the American Surety Company of New York has become surety of Henry Van Schaick on a certain bond of even date herewith, for the sum of Seventy-five thousand dollars in an action in the Supreme Court of the County of Albany and State of New York wherein John Van Schaick Oddie is plaintiff and Henry Van Schaick and others are defendants a copy of which bond is hereto annexed, marked "A" and forms a part of this agreement.

Now, therefore, in consideration of the premises and of the sum of one dollar in hand paid to said parties of the first part, the receipt whereof is hereby acknowledged the said parties of the first part hereby agree and bind themselves and each of their heirs and assigns, jointly and severally, as follows, to wit:

That said parties shall and will at all times indemnify, and keep indemnified, and save harmless the said Company from and against all loss, damages, costs, charges, counsel fees and expense whatsoever which said Company shall or may, for any cause at any time, sustain or incur by reason or in consequence of said Company having executed said instrument; and do further covenant and agree to pay to said Company and its representatives all damages for which 49 said Company or its representatives shall become responsible upon the said bond before said Company or its representatives shall be compelled to pay the same, any sum so paid, however, to be applied to the payment of such damages; and in case any suit, action or other proceeding shall be commenced or notice served on said parties of the first part in any manner relating to or growing out of the matter or business for or on account of which the aforesaid instrument was required to be executed, immediate notice thereof shall be given to said Company at its office in New York.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

HENRY SYBRANT VAN SCHAICK.

[SEAL.]

GEORGE GRAY VAN SCHAICK.

[SEAL.]

EUGENE VAN SCHAICK.

[SEAL.]

Signed, sealed and delivered in the presence of

WILLIAM A. BOECKEL.

STATE OF NEW YORK,

County of New York, ss:

On this 25th day of March, one thousand eight hundred and ninety-seven before me personally came Henry Sybrant Van Schaick, George Gray Van Schaick, Eugene Van Schaick to me known, and known to me to be the individuals described in and who executed the foregoing and within instrument, and they severally duly acknowledged to me that they had executed the same.

[SEAL.]

WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

This indenture made this 29th day of September, in the year One thousand eight hundred and ninety-three, between Henry Sybrant Van Schaick, of the City of New York, and Ada Davies Van Schaick, his wife, George Gray Van Schaick, unmarried, of the City of New York, Countess Elise Boutourline (nee Van Schaick) of Florence, Italy, and Count Alexandre Boutourline, her husband, and Eugene Van Schaick of the City of New York, and Sarah Howland Van Schaick, his wife, parties of the first part and Henry Van Schaick, of the City, County and State of New York, party of the second part:

Whereas under the last will and testament of Jane C. Van Schaick, late of the City of Albany, the party of the second part was given and devised one-half of all her real estate, lands, tenements and hereditaments which she owned or should be legally or equitably entitled to at the time of her decease, for and during the life of the said party of the second part only, and the remainder in fee simple in said half part of the descendants of the said party of the second part who shall be living at the time of her decease; and

Whereas it is deemed beneficial to the said property that it be held in fee simple, and the parties of the first part are desirous of relinquishing, conveying and assigning their vested remainder in and to said property to the party of the second part, so as to give him title in fee simple to the said property, instead of a life estate;

Now, therefore, this indenture witnesseth:

That in consideration of the premises, and of the sum of
 51 One Dollar by the party of the second part to the parties of
 the first part in hand paid, the receipt whereof is hereby con-
 fessed and acknowledged, the parties of the first part do hereby grant
 remise and release to the party of the second part all their right,
 title and interest in and to the real estate, lands, tenements and her-
 editaments which were of said Jane C. Van Schaick, late of the City
 of Albany, together with the appurtenances, and all the estate and
 rights of the said parties of the first part, to have and to hold the
 above granted premises unto the said party of the second part, his
 heirs and assigns forever.

And the said parties of the first part do covenant with the said
 party of the second part that they will execute or procure any further
 necessary assurance of the title to said premises.

In witness whereof the said parties of the first part have hereunto
 set their hands and seals the day and year first above written.

HENRY SYBRANT VAN SCHAIK,	[L. S.]
ADA DAVIES VAN SCHAIK,	[L. S.]
GEORGE GRAY VAN SCHAIK.	[L. S.]

Signed, sealed and delivered in the presence of:

WILLIAM A. BOECKEL,

As to Henry Sybrant Van Schaick, Ada Davies Van
 Schaick, George Gray Van Schaick, Eugene Van
 Schaick and Sarah Howland Van Schaick.

G. G. VAN SCHAIK, as to

CTESSE, ELISABETH BOUTOURLINE.	[L. S.]
--------------------------------	---------

and

COMTE ALEXANDRE BOUTOURLINE.	[L. S.]
------------------------------	---------

EUGENE VAN SCHAIK.	[L. S.]
--------------------	---------

SARAH HOWLAND VAN SCHAIK.	[L. S.]
---------------------------	---------

52 STATE OF NEW YORK,
City and County of New York, ss:

On this 29th day of September, 1893, before me personally came Henry Sybrant Van Schaick and Ada Davies Van Schaick, his wife, George Gray Van Schaick, Eugene Van Schaick and Sarah Howland Van Schaick, his wife, to me known and known to me to be the persons above named and who executed the above instrument, and duly, separately, personally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

Form 2.

STATE OF NEW YORK,
County of New York, ss:

No. 8723.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That

William A. Boeckel, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgement, a Notary Public, acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature of said deposition, or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 7 day of April, 1915.

WM. F. SCHNEIDER, *Clerk.*

Cancelled 10¢ Fed. Stamp affixed Apr. 7, 1915.

53 KINGDOM OF ITALY,
City of Florence, ss:

On this the 15th day of December, A. D. 1893, before me James Verner Long, U. S. Consul at Florence, personally appeared Coun-

tess Elisabeth Boutourline and Count Alexandre Boutourline, her husband, known to me and known to me to be the persons described in and who executed the within Instrument and acknowledged personally duly, separately to me that they executed the same for the uses and to the purposes therein mentioned.

Given under my hand and Consular Seal the day and year aforesaid.

[CONSULAR SEAL.]

JAMES VERNER LONG,
U. S. Consul at Florence, Italy.

54

EXHIBIT "D."

Know all men by these presents, that we, Eugene Van Schaick of the City of New York, as principal, and The Union Surety and Guaranty Company, a corporation duly organized and existing under and pursuant to the laws of the State of Pennsylvania, and duly qualified and licensed to do business in the State of New York, and having its principal office at No. 135 Broadway, in the City of New York, as surety, are held and firmly bound unto The Brainerd, Shaler and Hall Quarry Company, a corporation duly organized and existing under the laws of the State of Connecticut, in the sum of Twenty thousand (20,000) Dollars, lawful money of the United States, to be paid to the said The Brainerd, Shaler and Hall Quarry Company, its successors or assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals. Dated the 9th day of May, in the year one thousand nine hundred and one.

Whereas, under the Will of Jane C. Van Schaick, late of the City of Albany, there was left to Henry Van Schaick as life tenant, the sum of sixty seven thousand one hundred and eighty-four and 87/100 (67,184.87) Dollars or thereabouts, with the remainder to his descendants who might be alive at the time of his death, which sum of money thereafter came into and now is in the possession of the said Henry Van Schaick; and

Whereas, Eugene Van Schaick, one of the said descendants, has sold, assigned, set over and transferred, or has caused to be assigned, set over and transferred, absolutely to the said The Brainerd, Shaler & Hall Quarry Company an interest in said remainder up to the amount or sum of twenty thousand (20,000) Dollars;

55 Now Therefore, the condition of this obligation is such that if the said Henry Van Schaick shall during his life time safely keep and preserve the said sum of Twenty thousand (20,000) Dollars, part of said principal sum of Sixty-seven Thousand, one hundred eighty-four 87/100 (67,184.87) Dollars, and if said sum of Twenty Thousand (20,000) Dollars shall thereafter be duly accounted for and paid over as provided for in the decree adjudicating the possession of said principal sum of Sixty-seven Thou-

sand One hundred Eighty-four 87/100 (67,184.87) Dollars, to the said Henry Van Schaick during his life, which decree bears date the first day of February 1897, and was entered on or about the third day of February, 1897, in the County of Albany, in an action wherein John Van Schaick Oddie was plaintiff and said Henry Van Schaick and others were defendants, then this obligation is to be void, otherwise to remain in full force, virtue and effect.

[L. S.] THE UNION SURETY AND GUARANTY CO.
A. MARCUS, *President.*

Attest:

J. J. MASON, *Secretary.*

EUGENE VAN SCHAICK. [L. S.]

STATE OF NEW YORK,
County of New York, ss:

On this 9th day of May, in the year one thousand nine hundred and one, before me personally came Eugene Van Schaick to me known and known to me to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

[SEAL.]

HENRY SCHLOSSER,
Notary Public, No. 262, New York County.

50 ets. Int. Rev. Stamp cancelled.

56 STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 9th day of May, A. D. 1901, before me personally appeared A. Marcus, to me known, who being by me duly sworn, did depose and say: That he resided in Englewood, New Jersey, that he is the President of The Union Surety and Guaranty Company, the Corporation described in and who executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by Section 3, Chapter 720 of the New York Session Laws of 1893.

And the said A. Marcus, further said, that he was acquainted with J. J. Mason, and knew him to be the Secretary of said Corporation; that the signature of said J. J. Mason, subscribed to said instrument is in the genuine handwriting of said J. J. Mason, and was thereto subscribed by the like order of said Board of Directors and in the presence of him, the said A. Marcus.

[SEAL.]

HENRY SCHLOSSER,
Notary Public, No. 262, New York County.

57 At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the Federal Post-Office Building, in the City and County of New York, on the 17th Day of April, 1917.

Present: Honorable Julian W. Mack, Judge.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

A motion having been made on behalf of both defendants in this action, when the same came on to be tried before this Court, for the dismissal of the action on the ground that the District Court of the United — has not cognizance of the same and the Court having allowed in open court amendment of the complaint by attaching thereto and making a part thereof a certain decree or order of the Supreme Court of the State of New York, Albany County, entered February 2, 1897, in an action entitled J. V. S. Oddie, plaintiff, against Henry Van Schaick and others, defendants,

Now, after hearing Bronson Winthrop, Esq., of counsel for the defendant The American Surety Company of New York, and Wilson B. Brice, Esq., attorney for the defendant W. B. Brice as sole surviving Executor under the last Will of Henry Van Schaick, 58 deceased, in support of said motion, and Edwin D. Worcester, Esq., of counsel for the plaintiff, in opposition thereto, it is, on motion of Winthrop & Stimson, attorneys for the defendant The American Surety Company of New York, and W. B. Brice, attorney for W. B. Brice as Executor, &c.,

Ordered that this action be and the same is hereby dismissed.

JULIAN W. MACK, U. S. C. J.

59 United States District Court, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY Co., Plaintiff,
against

WILSON B. BRICE as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and the American Surety Company of New York, Defendants.

This action having come on for trial before this court on the 12th day of April, 1917, and a motion having been made on behalf of both defendants at that time for the dismissal of this action on the ground that the District Court of the United States has not cognizance of the same and, on motion of Winthrop & Stimson, attorneys for the defendant the American Surety Company of New York, and W. B.

Brice, attorney for W. B. Brice, as Executor, &c., the court having ordered by order dated April 17, 1917, that this action be dismissed.

Now, on motion of Winthrop & Stimson, attorneys for the defendant American Surety Company, and W. B. Brice, attorney for W. B. Brice, as Executor, &c., it is

Adjudged that this action be and the same hereby is dismissed.

Dated, April 26, 1917.

ALEX GILCHRIST, JR., Clerk.

60 District Court of the United States, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company, Defendants.

Bill of Exceptions.

Be it remembered that afterwards, to wit, on the 12th day of April, 1917, at a stated term of the Court, held in the Borough of Manhattan, City and State of New York, in the said Southern District of New York, before the Hon. Julian W. Mack, District Judge, the issues joined in this action as shown in the pleadings herein came on to be tried. The following appearances were made:

GEORGE MURRAY BROOKS,
Attorney for Plaintiff.

EDWIN D. WORCESTER,
Of Counsel.

WINTHROP & STIMSON,
*Attorneys for Defendant The American
Surety Company of New York.*

BRONSON WINTHROP AND

C. T. PAYNE,
Of Counsel.

WILSON B. BRICE,
Defendant in Person.

A jury was duly empaneled and sworn.

Thereupon Mr. Winthrop on behalf of the defendant, American Surety Company of New York, moves on the pleadings to dismiss the complaint on the ground that the District Court of the United States has no jurisdiction under Section 24, Subdivision 1, of the Federal

Code because the plaintiff in this action sues by virtue of an assignment from one Eugene Van Schaick, and the complaint shows that the said Eugene Van Schaick was a resident and citizen of the State of New York, the State of which both defendants are residents and citizens.

Thereupon the defendant, Wilson B. Brice, makes a like motion on his own behalf.

For the purposes of these motions it is conceded that the plaintiff is a citizen of the State of Connecticut and that both of the defendants are citizens of the State of New York, and that the said Eugene Van Schaick was a citizen of the State of New York.

Mr. Worcester for the plaintiff moved that the order or decree (referred to in the complaint) for the distribution of the proceeds of the sales in the partition action brought by one Oddie against Henry Van Schaick be deemed to have been put in evidence by the plaintiff as a part of the record on which the motions to dismiss will be considered. This motion was granted. A copy of the said order or decree is hereto annexed marked "Schedule A."

The motions to dismiss the complaint were then opposed by the plaintiff and due argument thereon was made by counsel for the respective parties. The court then granted said motions to dismiss and counsel for the plaintiff noted an exception to such ruling.

Wherefore the counsel for the plaintiff insisted that the learned Court erred in dismissing the complaint for lack of jurisdiction and erred in refusing to maintain jurisdiction of the claim set forth in the complaint; and prayed and does now pray that this bill of exceptions be settled and sealed, and it is hereby settled and sealed accordingly.

April 1, 1918.

JULIAN W. MACK,
U. S. Circ. Judge.

62

SCHEDULE A.

At a Special Term of the Supreme Court of the State of New York, Held in and for the County of Albany, at Chambers, in the City of Albany, upon the 1st Day of February, 1897.

Present: Mr. Justice Alden Chester.

JOHN VAN SCHAIK ODDIE, Plaintiff,
against

HENRY VAN SCHAIK, HENRY SYBRANT VAN SCHAIK, and ADA J. VAN SCHAIK, His Wife; George Gray Van Schaick, Elizabeth Boutourline, Dimitri Boutourline, Vasili Boutourline, George Boutourline, Elise Boutourline, Aurore Boutourline, Eugene Van Schaick, and Sarah H. Van Schaick, His Wife; Engenia Brodhead, Josephine Bloodgood, Robert F. Bloodgood, and Eloise P. Bloodgood, His Wife; Elizabeth Van Schaick Winthrop, Helen F. Oddie, Wife of John Van Schaick Oddie; Robert Fanshawe Bloodgood, and Josephine Bloodgood, as Executor and Executrix of the Last Will of Emily A. Bloodgood, Deceased, Defendants.

Marcus T. Hun, the Referee named in the interlocutory judgment, made and entered in this action upon the 27th day of October, 1896,

having made and filed in the office of the Clerk of the City and County of Albany a supplemental report, bearing date the 22nd day of January, 1897, whereby it appears, among other things, that pursuant to the directions to the said Referee given, in and by the final judgment in this action, bearing date the 5th day of December, 1896, he has executed and delivered to the several purchasers of the premises sold by him as Referee deeds of the said premises purchased by them respectively, upon their complying with the terms and conditions of said sales, and has received from all of said purchasers the purchase money of the premises, mentioned in the

63 said Referee's former report of sale herein, bearing date the 20th day of November, 1896; that the said Referee has let

the respective purchasers into the possession of the premises so purchased by them; that the said Referee has paid out of the proceeds of the said sale the costs and expenses of the sale, including all taxes, assessments, quit-rents or water rates which on November 24th, 1896, the day of sale, were liens upon the premises sold; that he has retained his own fees, expenses and commissions for making such sale and ascertaining and reporting upon the distribution of the proceeds of said sale as specified in said final judgment; that he has paid to the several attorneys in this action the amount of the costs and disbursements in this action awarded to the several parties hereto, and also the several allowances made to the several attorneys in this action; that he has deposited in the Albany Savings Bank pursuant to said final judgment sums aggregating eighty-eight thousand four hundred and four dollars and seventy-four cents (\$88,404.74), being the balance of the cash proceeds of the said sales remaining after making the payment stated in the said report; that the defendants Eloise P. Bloodgood, wife of the defendant Robert F. Bloodgood, and Helen F. Oddie, wife of the plaintiff John Van Schaick Oddie, have severally executed and filed with the Clerk of Albany County releases to their respective husbands of their inchoate right of dower in the property sold in this action; that the net proceeds of the said sales so reported by the said Referee as aforesaid after deducting all of the said expenses of sale, and the costs of this action as shown by his said report, are the sum of one hundred and thirty-four thousand three hundred and sixty-nine dollars and seventy-four cents (\$134,369.74) comprised as follows:

64	Cash on deposit in Albany Savings Bank.....	\$88,404.74
	Bonds and mortgages charged on portions of the property sold	34,465.00
Property purchased by Eugenia Brodhead, Josephine Bloodgood and Robert F. Bloodgood, with which their share of the proceeds is to be charged.....		11,500.00
	Total	\$134,369.74

And this action coming on to be heard upon the aforesaid report of the said Referee, and on rehearing and filing the annexed contents

to the entry of this order by the attorneys for all of the adult parties appearing in this action, and of the guardian ad litem for all of the infant defendants, (subject to the approval of the Court) and on motion of Frederic de P. Foster, attorney for the plaintiff, it is

Ordered, That the said sum of one hundred and thirty-four thousand three hundred and sixty-nine dollars and seventy-four cents (\$134,369.74), the net proceeds of the said sale, be divided, distributed and paid over by the said Marcus T. Hun to and among the several parties to this action who are entitled to the same as hereinafter provided and directed, that is to say: One-eighth of said net proceeds, or the sum of sixteen thousand seven hundred and ninety-six dollars and twenty-one cents (\$16,796.21) belongs to the plaintiff, John V. S. Oddie, (his wife, the defendant Helen F. Oddie, having duly released her inchoate right of dower in the said real property unto her said husband), but the said share of the plaintiff is subject to the mortgage lien thereon held by Sarah A. Sands, upon which there is now due the principal sum of two thousand five hundred dollars (\$2,500) with interest thereon from the 1st day
65 of November, 1896, at the rate of six per cent per annum, and the total amount due on said mortgage upon the 22nd day of January, 1897, the date of the said report, is the sum of two thousand five hundred and thirty-three dollars and seventy-five cents (\$2,533.75) which amount shall be first paid by the said Referee out of the said share to the said Sarah A. Sands, upon her executing, acknowledging and delivering to the said Referee a Proper satisfaction of the said mortgage, and thereafter the balance of the said share then remaining, namely, the sum of fourteen thousand two hundred and sixty-two dollars and forty-six cents (\$14,262.46) shall be paid in cash to the said plaintiff John V. S. Oddie.

One-eighth of said net proceeds, or the sum of sixteen thousand seven hundred and ninety-six dollars and twenty-two cents (\$16,796.22) belongs to the defendant Elizabeth Van Schaick Winthrop, and said sum shall be paid to her as follows: The sum of fourteen thousand one hundred and thirty-six dollars and twenty-two cents (\$14,136.22) thereof shall be paid to her in cash, and the balance, to-wit, two thousand six hundred and sixty dollars (\$2,660) shall be paid to her by the assignment to her by said Referee of an undivided one half interest in the bond and mortgage executed to said Referee by John Hoy, to secure the sum of five thousand three hundred and twenty dollars (\$5,320) which said undivided interest in said bond and mortgage said Elizabeth Van Schaick Winthrop has consented to accept in lieu of cash for an equal amount.

One-sixteenth of said net proceeds, or the sum of eight thousand three hundred and ninety-eight dollars and twelve cents (\$8,393.12), belongs to the defendant Eugenia Brodhead, but her said share should be charged with two eighths of the sum of eleven thousand five hundred dollars (\$11,500), the value of the property purchased by her and by Josephine Bloodgood and Robert F. Bloodgood as tenants in common, viz: The sum of two thousand eight hundred and seventy-five dollars (\$2,875), and the balance of said share, to wit, the sum of five thousand five hundred
66

and twenty-three dollars and twelve cents (\$5,523.12) shall be paid to the said defendant Eugenia Brodhead in cash.

Three-thirty-seconds of said net proceeds, or the sum of twelve thousand five hundred and ninety-seven dollars and sixteen cents (\$12,597.16) belong to the defendant Josephine Bloodgood but her said share shall be charged with three eighths of the aforesaid sum of eleven thousand five hundred dollars (\$11,500), viz: with the sum of four thousand three hundred and twelve dollars and fifty cents (\$4,312.50), and the balance of said share, to wit, the sum of eight thousand two hundred and eighty-four dollars and sixty-six cents (\$8,284.66) shall be paid to the said defendant Josephine Bloodgood in cash.

Three-thirty-seconds of said net proceeds, or the sum of twelve thousand five hundred and ninety-seven dollars and sixteen cents (\$12,597.16), belong to the defendant Robert Fanshawe Bloodgood (his wife, the defendant Eloise P. Bloodgood, having duly released her inchoate right of dower in the said real property unto her said husband), but his said share shall be charged with three-eighths of the aforesaid sum of eleven thousand five hundred dollars (\$11,500), viz: with the sum of four thousand three hundred and twelve dollars and fifty cents (\$4,312.50), and the balance of said share, to

67 wit, the sum of eight thousand two hundred and eighty-four dollars and sixty-six cents, (\$8,284.66) shall be paid to the said defendant Robert Fanshawe Bloodgood, as follows: The sum of five thousand six hundred and twenty-four dollars and sixty-six cents (\$5,624.66) thereof shall be paid to him in cash and the balance thereof, to wit, two thousand six hundred and sixty dollars (\$2,660) shall be paid to him by the assignment to him by said Referee of an undivided one-half interest in the aforesaid bond and mortgage executed to said Referee by John Hoy to secure the sum of five thousand three hundred and twenty dollars (\$3,320), which said undivided interest in said bond and mortgage said Robert Fanshawe Bloodgood has consented to accept in lieu of cash for an equal amount.

One-half of said net proceeds or the sum of sixty-seven thousand one hundred and eighty-four dollars and eighty-seven cents (\$67,184.87), belongs to the defendant Henry Van Schaick for and during the term of his natural life; and at his death the said share will pass to and vest absolutely in such of the descendants of the said Henry Van Schaick as shall then be living, or in such persons as shall then be the legal owners or holders of said vested sub-shares by assignments from said surviving descendants; the said descendants to take their several sub-shares by representation; and it being impossible to determine at this time the persons to whom the said share, and its several divisions will be payable at the death of the said Henry Van Schaick (although all of the persons now in being who, at the time of the commencement of this action, had any vested or contingent interest in remainder therein were made parties to this action, and their presumptive future estates therein, as at present ascertained are as stated and set forth in the interlocutory

68 judgment in this action), and the said Henry Van Schaick not having filed any consent herein to receive a gross sum in satisfaction of his life estate or interests, the said one half of the net proceeds of the said sales, shall either be paid into Court, by the said Referee, for the purpose of being invested for the benefit of the said Henry Van Schaick; or, if within twenty days from the entry of this order, the said Henry Van Schaick shall furnish proper security, as hereinafter directed, for the safe keeping and preservation of the said sum during his life-time, to the end that at his decease the same may be paid over and distributed per stirpes among the descendants of the said Henry Van Schaick and the persons to whom the said share shall then belong, that then the said moiety of the said net proceeds shall be immediately paid over to said Referee to the said Henry Van Schaick to be held by him during his life, with the full use of the income thereof. The security above referred to may consist of a bond to be executed by the said Henry Van Schaick as principal, with the American Surety Company, a corporation organized and existing under the laws of the State of New York, as surety, to the descendants now living of the said Henry Van Schaick, who are parties to this action, and to such other descendants of the said Henry Van Schaick as shall survive him, and to such other persons as shall be entitled, upon the death of the said Henry Van Schaick to receive any portion of the share of the said proceeds in which he has a life interest. The said bond to be in the penal sum of seventy-five thousand dollars (\$75,000) and to be void if the said Henry Van Schaick shall, during his life time, safely keep and preserve the principal, of said share of said net proceeds, and the said bond shall after its execution and before the filing thereof, be approved by a Justice of this Court,

69 and upon such approval being given the same shall be filed in the office of the Clerk of Albany County. The said last mentioned one-half of said net proceeds shall include and comprise the sum of thirty-eight thousand and thirty-nine dollars and eighty-seven cents, (\$38,039.87) in cash, and also the four remaining mortgages, and the bonds accompanying the same, executed to said Referee by the purchasers other than the said John Hoy, said four bonds and mortgages representing the aggregate sum of twenty-nine thousand one hundred and forty-five dollars (\$29,145) of the purchase money, and which said bond and mortgage shall, for the purpose of this distribution, be regarded as equivalent to cash for the amounts secured to be paid by them respectively.

It is further ordered that the said Referee take receipts from the several parties to whom payments are made under any of the provisions of this order, and that he report his proceedings hereunder with all convenient speed.

It is further ordered that the accrued interest on the mortgages shall all belong to the parties to whom the mortgages shall be assigned; and the accrued interest on the moneys deposited in said Bank shall be distributed by the said Referee pro rata among the parties in the same proportions as the said parties are entitled to share in the distribution of said moneys so deposited.

Enter,

ALDEN CHESTER, J. S. C.

We consent to the entry of the foregoing order. Dated, New York City, January 27, 1897.

FREDERIC DE P. FOSTER,

Pltf's Atty.

CANTOR & VAN SCHAICK,

Attys. for Deft. Henry Van Schaick et al.

JOHN W. PIRSSON,

Atty. for Deft. Eugenia Brodhead et al.

70

GRENVILLE B. WINTHROP,

Attorney for Deft. Elizabeth V. S. Winthrop.

I consent to the entry of the foregoing order subject to the approval of this Court.

AUG. T. GILLENDER,

Guardian ad Litem.

71 We consent that the foregoing be settled and sealed as the bill of exceptions upon the plaintiff's writ of error to the Supreme Court of the United States. Dated, New York, April 1, 1918.

GEO. MURRAY BROOKS,

Attorney for Plaintiff.

WINTHROP & STIMSON,

Attorneys for Defendant American Surety Company of New York.

WILSON B. BRICE,

Attorney for Defendant Wilson B. Brice, as Exec., etc.

72 [Endorsed:] District Court of the United States, Southern District of New York. The Brainerd, Shaler & Hall Quarry Company, Plaintiff, against Wilson B. Brice, as sole surviving executor of the Last Will and Testament of Henry Van Schaick, deceased, and The American Surety Company, Defendants. Bill of Exceptions. Geo. Murray Brooks, Attorney for Plaintiff, Equitable Building, 120 Broadway, Borough of Manhattan, New York City.

73 In the District Court of the United States for the Southern District of New York, at a Term Holden in April, A. D. 1917, in the Federal Post-office Building, in the City and County of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Petition for Writ of Error.

To the Hon. Julian W. Mack, Judge of the District Court aforesaid:

Now comes The Brainerd, Shaler and Hall Quarry Company, by George Murray Brooks, its attorney, and respectfully shows that on

the 12th day of April, A. D. 1917, the Court, upon the motion of the defendants, made an order herein dismissing the complaint on the sole ground that this Court has no jurisdiction of the subject-matter of this action, and that on said order a judgment was duly entered on the 26th day of April, A. D. 1917, dismissing the complaint herein.

Your petitioner, feeling itself aggrieved by the said order and the judgment thereon entered as aforesaid, herewith petitions the Court for an order allowing him to prosecute a Writ of Error to the Supreme Court of the United States, under the laws of the United States in that case made and provided.

Wherefore your petitioner prays that a Writ of Error to the Supreme Court of the United States for the correction of the
 74 errors complained of and herewith assigned be allowed and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs.

Dated, New York, April 27th A. D. 1917.

GEO. MURRAY BROOKS,
Attorney for Plaintiff.

Writ of Error allowed as prayed for this 27th day of April A. D., 1917, and the amount of the bond fixed at \$250.00.

JULIAN W. MACK,
U. S. Circuit Judge.

75 In the District Court of the United States for the Southern District of New York, at a Term Holden in April, A. D. 1917, in the Federal Post-office Building, in the City and County of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
 against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Assignment of Errors.

And now, on this 27th day of April, A. D. 1917, comes the plaintiff, by George Murray Brooks, its attorney, and says that the order made in this action dismissing the complaint on the sole ground that the court has no jurisdiction of the subject-matter of this action, and the judgment entered thereon on the 26th day of April, A. D. 1917, dismissing the complaint, is erroneous and unjust to the plaintiff for the following reasons:

First. That the learned District Court erred in dismissing the complaint in this cause for lack of jurisdiction.

Second. That the learned District Court erred in refusing to maintain jurisdiction of the claim set forth in the complaint.

Wherefore, the plaintiff prays that the said judgment be reversed, and that the District Court be instructed to proceed with the hearing and trial of the action.

Dated, New York, April 27th, A. D. 1917.

GEO. MURRAY BROOKS,

Attorney for Plaintiff.

120 Broadway, Borough of Manhattan, City of New York.

76 District Court of the United States of America for the Southern District of New York in the Second Circuit.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff-Appellant,

against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants-Respondents.

Bond on Appeal.

Know all men by these presents, That The Brainerd, Shaler & Hall Quarry Company as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Wilson B. Brice, as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and the American Surety Company of New York, in the sum of Two Hundred and Fifty (\$250.00) Dollars to be paid to the said Wilson B. Brice, as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and the American Surety Company of New York, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these present. Sealed and dated the 27th day of April, 1917.

Whereas, the above named The Brainerd, Shaler & Hall Quarry Company have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named The Brainerd, Shaler & Hall Quarry Company shall prosecute said writ to effect, and answer all damages and costs if it

fails to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice-President.

Attest:

E. M. McCARTHY,
Resident Assistant Secretary.

George M. Brooks, 120 Broadway, New York City, Attorney for Plaintiff.

I approve of the *written Bond*, and of the sufficiency of the surety thereon.

April 30, 1917.

JULIAN W. MACK,
U. S. C. J.

78 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 28th day of April 1917, before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of The Brainerd, Shaler & Hall Quarry Company as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of The Brainerd, Shaler & Hall Quarry Company is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Eight Million dollars.

79 WM. A. THOMPSON.
Deponent's Signature.

Signed, sworn to, and acknowledged before me this 27th day of April, 1917.

H. E. EMMETT,
Notary Public for Kings County, No. 9.

Certificate filed in New York County No. 20. Nassau, Bronx No. 1, Queens No. 631, Richmond and Westchester Counties; Kings County Register's Office No. 8008. New York County Register's Office No. 8023. Bronx County Register's Office No. 804. My commission expires March 30, 1918.

80 District Court of the United States, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Certificate.

In this cause, I hereby certify that this writ of error is allowed solely, and that the order herein dismissing the complaint was based solely, on the ground that no jurisdiction of the District Court existed; that this question has been determined by me on the following grounds.

This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the continuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the State of New York
81 and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made.

This certificate is made conformably to Section 238 of the Judicial Code.

JULIAN W. MACK,
U. S. Circuit Judge.

82 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Brainerd, Shaler & Hall Quarry Company, plaintiff and Wilson S. Brice as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and The American Surety Company of New York, defendants, a manifest error hath happened, to the great damage of said plaintiff, The Brainerd, Shaler & Hall Quarry Company, as by *his* complaint appears, by which said judgment the complaint was dismissed on the sole ground that upon all the pleadings and proceedings had therein no jurisdiction of the District Court of the United States existed, and the action was dismissed for that reason alone!

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date thereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 30 day of April, in the year of our Lord, one thousand nine hundred and seventeen.

[SEAL.]

ALEX. GILCHRIST, JR.,
Clerk U. S. District Court,

M.

Southern District of New York.

Allowed by

JULIAN W. MACK,
U. S. Circuit Judge.

84 UNITED STATES OF AMERICA, ss:

To Wilson B. Brice, as sole surviving executor of the last Will and Testament of Henry Van Schaick, deceased, and the American Surety Company of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States District Court of the Southern District of New York, wherein The Brainerd, Shaler & Hall Quarry Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Julian W. Mack, United States Circuit Judge, this 30th day of April, in the year of our Lord one thousand nine hundred and seventeen.

JULIAN W. MACK,
*United States Circuit Judge, This 30th Day of
April, in the Year of Our Lord One Thou-
sand Nine Hundred and Seventeen.*

We hereby admit and accept service of the within Citation on behalf of the defendants in error this 4th day of May, 1917.

WINTHROP & STIMSON,
*Attorneys for Defendant American
Surety Co. of New York.*

WILSON B. BRICE,
*Attorney for Defendant Brice and
Defendant in Person.*

Filed May 4, 1917.

85 United States District Court, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and the American Surety Company of New York, Defendants.

Stipulation.

It is hereby stipulated that the portions of the record that shall constitute the transcript of record on appeal in this action shall consist of the following:

1. Summons.
2. Complaint.
3. Third Amended Answer—Wilson B. Brice.
4. Third Amended Answer—American Surety Co.
5. Order of Dismissal.
6. Judgment of Dismissal.
7. Bill of Exceptions.
8. Petition for Writ of Error, and order allowing same.

9. Assignment of Errors.
10. Bond on Appeal.
11. Writ of Error.
12. Certificate of Writ of Error.
13. Citation in Error.
14. The foregoing Stipulation.

Dated, New York, April 4, 1918.

GEORGE MURRAY BROOKS,

Of Counsel.

WORCESTER, WILLIAMS & SAXE,
Attorneys for Plaintiff.

WINTHROP & STIMSON,
*Attorneys for Defendant American
Surety Company.*

WILSON B. BRICE,
*Attorney for Defendant Wilson B
Brice, as Executor, etc.*

Stipulation on Appeal Record.

United States District Court, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and
Testament of Henry Van Schaick, Deceased, and the American
Surety Company, Defendants.

It is hereby stipulated and agreed, that the foregoing is a true
transcript of the record of the said District Court in the above-
entitled matter as agreed on by the parties.

Dated New York, April 8, 1918.

GEORGE MURRAY BROOKS,

Of Counsel.

WORCESTER, WILLIAMS & SAXE,
Attorneys for Plaintiff.

WINTHROP & STIMSON,
Attorneys for American Surety Company.

WILSON B. BRICE,
*Attorney for Wilson B. Brice,
as Executor.*

[Endorsed:] United States District Court, Southern District of
New York. The Brainerd, Shaler & Hall Quarry Company, Plain-
tiff, vs. Wilson B. Brice et al., Defendants. Stipulation as to cor-
rectness of appeal record.

87 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
vs.

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and
Testament of Henry Van Schaick, Deceased, and The American
Surety Company, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the
United States of America for the Southern District of New York, do
hereby Certify that the foregoing is a correct transcript of the record
of the said District Court in the above-entitled matter as agreed on
by the parties.

In testimony whereof, I have caused the seal of the said Court to
be hereunto affixed, at the City of New York, in the Southern Dis-
trict of New York, this tenth day of April in the year of our Lord
one thousand nine hundred and eighteen and of the Independence
of the said United States the one hundred and forty-second.

[Seal District Court of the United States, Southern District
of N. Y.]

ALEX GILCHRIST, JR., Clerk.

88 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of
the District Court of the United States for the Southern District
of New York, Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said District Court, before you,
or some of you, between The Brainerd, Shaler & Hall Quarry Com-
pany, plaintiff and Wilson S. Brice as sole surviving Executor of
the Last Will and Testament of Henry Van Schaick, deceased, and
The American Surety Company of New York, defendants, a mani-
fest error hath happened, to the great damage of said plaintiff, The
Brainerd, Shaler & Hall Quarry Company, as by his complaint ap-
pears, by which said judgment the complaint was dismissed on the
sole ground that upon all the pleadings and proceedings had therein
no jurisdiction of the District Court of the United States existed, and
the action was dismissed for that reason alone:

We being willing that error, if any hath been, should be duly
corrected, and full and speedy justice done to the parties aforesaid
in this behalf, do command you, if judgment be therein given, that
then under your seal distinctly and openly, you send the record and
proceedings aforesaid, with all things concerning the same, to the
Supreme Court of the United States, together with this writ, so that

you have the same at Washington, in the said Supreme Court, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 30th day of April, in the year of our Lord, one thousand nine hundred and seventeen.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.
*Clerk U. S. District Court, Southern
District of New York.*

Allowed by

JULIAN W. MACK,
U. S. Circuit Judge.

90 [Endorsed:] L. 15—239. District Court of the U. S., Southern District of New York. The Brainerd, Shaler & Hall Quarry Company, Plaintiff, against Wilson B. Brice, as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and The American Surety Company of New York, Defendants. Writ of Error. Geo. Murray Brooks, Attorney for Plaintiff, Equitable Building, 120 Broadway, Borough of Manhattan, New York City. U. S. District Court. S. D. of N. Y. Filed Apr. 30, 1917.

Endorsed on cover: File No. 26471. S. New York D. C. U. S. Term No. 1004. The Brainerd, Shaler & Hall Quarry Company, Plaintiff in Error, vs. Wilson B. Brice, as sole surviving Executor of the last will and testament of Henry Van Schaick, deceased, and The American Surety Company. Filed April 25th, 1918. File No. 26471.

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 1004.

THE BRAINERD SHALER & HALL
QUARRY COMPANY,
Plaintiff-in-Error,

AGAINST

WILSON S. BRICE, as Executor, etc.
and THE AMERICAN SURETY COM-
PANY OF NEW YORK,
Defendants-in-Error.

To WINTHROP & STIMSON, Esqs.,
Attorneys for The American Surety Co.,
Defendant-in-Error, and to
WILSON S. BRICE, as Executor, etc.,
Defendant-in-Error in Person.

GENTLEMEN:

Please take notice that on the 24th day of February, 1919, the plaintiff-in-error will present to the Supreme Court of the United States, in the matter above entitled, a motion to advance the hearing of said cause; of which motion a copy is hereto annexed. I also deliver to you herewith 5 copies of the brief that will be presented by plaintiff-in-error with the motion.

Yours, etc.,

EDWIN D. WORCESTER,
Attorney and Counsel for Plaintiff-in-Error,
30 Broad St.,
Borough of Manhattan,
City of New York.

(26,471)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1004.

THE BRAINERD SHALER & HALL
QUARRY COMPANY,
Plaintiff-in-Error,

vs.

WILSON S. BRICE, as sole surviving
Executor of the Last Will and Tes-
tament of Henry Van Schaick, de-
ceased, and THE AMERICAN SURETY
COMPANY OF NEW YORK,
Defendants-in-Error.

In Error to the District Court of the
United States for the Southern Dis-
trict of New York.

And now, this 24th day of February, 1919, comes the Plaintiff-in-Error, by its counsel, and moves the Court to advance the above-entitled cause for hearing in the manner prescribed by Rule Six in accordance with Rule Thirty-two of this Court, because the only question in issue is the question of the jurisdiction of the Court below, and this Writ of Error is sued out under Section 238 of the Judicial Code.

EDWIN D. WORCESTER,
Counsel for Plaintiff-in-Error.

THE BRIEF.

1. Nature of the action and the errors complained of.

This is a common-law action brought to recover \$20,000. that had been assigned to the plaintiff out of a certain remainder-interest in a fund of money, and brought also against the bondsman of the life-tenant of such fund. Both defendants interposed answers to the complaint; neither of these answers contains any plea or objection to the jurisdiction. The issues of fact having been brought on for trial, and before any evidence was given, the defendants moved on the pleadings to dismiss the complaint, on the ground that, by reason of the provisions of Subdivision 1 of Section 24 of the Judicial Code, the Court was without jurisdiction. This motion will be found on pages 32 and 33 of the record. The motion was granted, on the sole ground of lack of jurisdiction; and the court ordered certain matter to be annexed to the record (fol. 61). The certificate of the trial judge sets forth the reasons that moved him (see p. 42). The plaintiff thereupon sued out this writ of error directly to the Supreme Court of the United States. The only errors assigned are

1. That the learned District Court erred in dismissing the complaint in this cause for lack of jurisdiction.
2. That the learned District Court erred in refusing to maintain jurisdiction of the claim set forth in the complaint (see fol. 75).

2. Statement of Facts.

Jane C. Van Schaick, of Albany, New York, was at the time of her death the owner of certain lands situated in the counties of Albany and Rensselaer in that State. By her last will she devised an undivided one-half part of those lands to her cousin, Henry Van Schaick, of New York, for his life only, with remainder to the descendants of Henry Van Schaick who should be living at the time of his decease (fol. 3). Henry Van Schaick survived Jane, and at the time of her death had four children, then living, to wit: George Gray Van Schaick, Elizabeth Boutourline, Eugene Van Schaick, and Henry S. Van Schaick (fol. 4). In September, 1894, Eugene Van Schaick, through an intermediary, assigned all his said remainder interest to his wife, Sarah H. Van Schaick (fols. 4, 5).

In January, 1896, one John Van Schaick Oddie commenced an action for the partition of the said lands of Jane C. Van Schaick. This action of partition was brought in the New York Supreme Court, County of Albany, and among the parties defendant thereto were Henry Van Schaick, Eugene Van Schaick and Sarah H. Van Schaick, his wife, Henry S. Van Schaick, George Gray Van Schaick, and Elizabeth Boutourline (fol. 5). October 27, 1896, an interlocutory judgment was entered in this action, adjudging (among other things) that the said Henry Van Schaick had a life-estate as tenant in common in one undivided half part or moiety of said lands; and that Henry S. Van Schaick, George Gray Van Schaick, Elizabeth Boutourline and Sarah H. Van Schaick, wife

of Eugene Van Schaick, had equal vested estates in remainder in the same moiety. It was further adjudged that in each case, except that of Sarah H. Van Schaick, such vested remainder was limited to commence in possession upon the death of said Henry Van Schaick, and was liable to be divested by the death of the owner in said Henry Van Schaick's lifetime; and if so divested, the share would vest in the descendants of the one so dying, and failing such descendants, would vest in the then-living descendants of said Henry Van Schaick. It was further adjudged that, in the case of Sarah H. Van Schaick, her vested remainder was limited to commence in possession upon the death of said Henry Van Schaick if her husband Eugene Van Schaick should then be living; and was liable to be divested by the death of said Eugene Van Schaick in the lifetime of said Henry Van Schaick, and if so divested, said share would vest in the same manner as in the case of shares of the children of said Henry Van Schaick (fols. 5, 6).

The said interlocutory judgment further adjudged that actual partition of said lands could not be made without great prejudice to the owners, and accordingly ordered that the lands be sold at public auction according to law and the practice of the court; and appointed a referee to sell (fol. 6). The referee subsequently sold said lands and made report to the Court, and on December 5th, 1896, final judgment was entered. This final judgment confirmed the referee's report, and validated the sales reported by him; and directed him, out of the proceeds, to pay certain charges specified, and to

deposit the balance of such proceeds in the Albany Savings Bank until further order (fol. 7). Still later, and on January 22, 1897, the referee reported that he had made the payments directed, and that the net proceeds of the sales, after such payments, were the sum of \$134,369.74 (fol. 8). Thereafter and under date the 1st day of February the said Court made an order or decree of distribution of the said sum of \$134,369.74. A copy of said order or decree is annexed to the record herein, marked Schedule "A", see page 33, folios 62 to 69.

This distribution decree determined, among other things, that one-half of said net proceeds, being the sum of \$67,184.87, belonged to Henry Van Schaick for his life; and that at his death it would pass to and vest absolutely in such of his descendants as should then be living, *or in such persons as shall then be the legal owners or holders of said vested sub-shares by assignments from said surviving descendants;* and, it being impossible to determine at that time the persons to whom the said share and its several divisions would be payable at the death of Henry Van Schaick, it was ordered that if within twenty days Henry Van Schaick "shall furnish proper security, as hereinafter provided, for the safe keeping and preservation of the said sum during his lifetime, to the end that at his decease the same may be paid over and distributed *per stirpes* among the descendants of the said Henry Van Schaick *and the persons to whom the said share shall then belong*", that then the said moiety should be immediately paid over by the Referee

to Henry Van Schaick. The decree further provided that the said security might consist of a bond, by Henry Van Schaick as principal and the American Surety Company, a New York corporation, as surety, "to the descendants now living of the said Henry Van Schaick who are parties to this action, and to such other descendants of the said Henry Van Schaick as shall survive him, *and to such other persons as shall be entitled, upon the death of the said Henry Van Schaick to receive any portion of the share of the said proceeds in which he has a life interest*"; said bond to be in the penal sum of \$75,000 and to be void if Henry Van Schaick should, during his lifetime, safely keep and preserve the principal of said share, which bond should be approved by a Justice of the Court, and filed in the Albany County Clerk's office.

Thereafter, a bond was in fact executed by said Henry Van Schaick and the American Surety Company and was approved by a Justice of the Court, and was filed in the Albany County Clerk's Office (fol. 11). A copy of this bond forms Exhibit A annexed to the Complaint herein, and will be found in folios 16 and 17 of the record. This bond bears date February 3, 1897. It is made by said Henry Van Schaick as principal and American Surety Company as surety who are held and bound "unto such descendants of the said Henry Van Schaick as shall be living at the time of his death in the sum of seventy-five thousand dollars (\$75,000) lawful money of the United States, to be paid to them, their executors, administrators or assigns". It then refers to the order or decree

of distribution, and concludes with the following condition:

"Now, therefore, the condition of this obligation is such that if the above bounden Henry Van Schaick shall during his lifetime, safely keep and preserve the principal of said Sixty seven thousand, one hundred and eighty four dollars and eighty seven cents (\$67,184.87), and if such sum of \$67,184.87 shall thereafter be duly accounted for and paid to his descendants *as provided in the decree aforementioned*", then the obligation to be void, else to remain in full force and effect (fol. 17).

Upon the filing of this bond, the Referee paid over to Henry Van Schaick the said \$67,184.87.

Thereafter, the interest in said remainder held by Sarah H. Van Schaick was by various mesne assignments transferred from her back to her husband Eugene Van Schaick, who had originally owned it (see fol. 5 and fol. 12); and on April 21, 1898, he was again the owner of said sub-share of said remainder.

Thereafter on May 9, 1901, for good and valuable consideration Eugene Van Schaick assigned to the plaintiff, The Brainerd Shaler & Hall Quarry Company, the gross sum of \$20,000 to be paid out of his said remainder interest (fol. 12). This assignment is Exhibit B, annexed to the Complaint, and will be found at folios 18 to 20 (pp. 9 and 10). This instrument recites that Henry Van Schaick, the assignor's father, holds for life the sum of \$67,184.87, being proceeds of a sale in partition of lands whereof one Jane Van Schaick had devised an undivided one-half to said

Henry Van Schaick, which sum was paid over to him pursuant to a decree of distribution (reciting the action and decree already hereinbefore referred to); and recites that the reversion and remainder of an undivided one-third part of said \$67,184.87 belongs to and is vested in the assignor, subject however to be divested by his death occurring before the death of the said Henry Van Schaick. (It should be noted that Henry S. Van Schaick, Eugene's brother, died prior to his father, Henry Van Schaick, without issue (fol. 12), whereby Eugene's sub-share was increased to a one-third share). And after these recitals, the assignor assigned to the assignee (the plaintiff) the sum of \$20,000. to be payable out of the assignor's said one-third interest in the said proceeds of sale now in the hands of Henry Van Schaick, together with all the assignor's interest in said remainder up to the sum of \$20,000. aforesaid at the time of the vesting of said remainder in possession upon the death of the said Henry Van Schaick. With covenants of title and warranty.

Henry Van Schaick died on or about November 15, 1914 (fol. 13).

He left him surviving the said George Gray Van Schaick, Elizabeth Boutourline, and Eugene Van Schaick (fol. 13) (Henry S. Van Schaick had died before him without issue), and no other living descendant. Letters-testamentary upon his estate were duly issued by the Surrogates' Court of New York County to Eugene Van Schaick and the defendant Wilson B. Brice (fol. 13).

Thereafter, Eugene Van Schaick died, on or about January 27, 1916 (fol. 13).

Henry Van Schaick did not during his lifetime safely keep or preserve the principal of said \$67,148.67, and the said sum has not been accounted for and has not been paid nor has any part thereof been paid to his descendants or to the persons to whom the same belongs, as provided for in the decree mentioned in the bond, and had been wholly lost prior to Henry Van Schaick's death (fol. 13); and plaintiff prior to the commencement of this action duly demanded from defendant Brice as executor payment of the said assigned \$20,000. (fols. 13, 14).

Thereafter, this action was commenced in the District Court of the United States for the Southern District of New York. Plaintiff is a Connecticut Corporation, and is a citizen and resident of Connecticut. Both of the defendants are citizens and residents of New York. Eugene Van Schaick in his lifetime and at his death was a citizen and resident of New York (fol. 61).

Both defendants interposed answers, neither of which contained any objection to the jurisdiction. The issues of fact having come on for trial, and before any evidence had been given, the defendants moved on the pleadings, under Subdivision 1 of Section 24 of the Judicial Code, to dismiss the complaint on the ground that the District Court was without jurisdiction (fol. 61). The grounds of the motion were:

"Because the plaintiff in this action sues by virtue of an assignment from one Eugene

Van Schaick, and the complaint shows that the said Eugene Van Schaick was a resident and citizen of the State of New York, the State of which both defendants are residents and citizens" (fol. 61).

Before deciding the motion, and upon plaintiff's motion, the Court ordered that the said order or decree of distribution should be deemed to have been put in evidence by the plaintiff as a part of the record on which the motions to dismiss would be considered (fol. 61).

The Court then considered and granted the motions to dismiss, and the plaintiff noted an exception to such decision. The trial-judge thereafter made his certificate, setting forth the grounds upon which he granted the motion, which grounds are as follows (fols. 80, 81):

" This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the continuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the

State of New York and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made."

The plaintiff then sued out this writ of error to the United States Supreme Court.

FIRST POINT.

The fact that the action is based upon an assignment of a remainder-interest does not oust the District Court of jurisdiction.

Both under this and under the succeeding points, the grounds upon which the learned District Court refused jurisdiction cannot be better stated than in the careful certificate of the District Judge (see p. 42). His words are as follows:

"This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the con-

tinuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the State of New York and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made."

So far as this objection is based upon the undoubted assignment by Eugene Van Schaick to the plaintiff of a part of his interest in such fund, it is believed that the objection is fully covered and refuted by the decision in

Brown *v.* Fletcher, 235 U. S. 589.

SECOND POINT.

So far as the objection is based upon the fact that the action is brought to recover on the bond, that fact did not justify the District Court in refusing jurisdiction.

We refer again to the certificate of the District Judge, quoted in the foregoing point.

The complaint neither alleges nor counts upon any assignment of the bond. The certificate of the District Judge does not assert that any such assignment was ever made. In fact, Eugene Van Schaick never did assign the said bond or his interest therein.

It is the theory and contention of the plaintiff that when once Eugene Van Schaick had assigned the share in his remainder interest, the bond, so far as it related to that interest, passed to the plaintiff without assignment, and that no assignment of the bond was necessary. The plaintiff considers that the Surety Company's obligation was given for the protection of whosoever should hold and own Eugene's remainder interest at the death of Henry Van Schaick. Such holder and owner of Eugene's interest would need no assignment of the defendant Surety Company's obligation. That obligation passed to such owner and holder without assignment, in the same way that the obligation of a warranty, in a deed of conveyance, passes to subsequent purchasers of the land.

If the plaintiff is right in this theory, and if also the assignment of Eugene Van Schaick's interest in the fund is not within the prohibition of Section 24, then, plainly, the District Court should have retained jurisdiction.

If, however, the plaintiff is wrong in this theory, and cannot, under common-law rules, maintain an action on the bond unless it can show a special assignment thereof, then the plaintiff must lose its action on the merits. But this is matter of defence, to be raised by demurrer or answer, but not to be raised by a plea to the jurisdiction.

In other words, and so far as this motion is concerned, *there is no assignment of the bond in the case*. The learned District Court should not have considered it at all, much less have made it the ground for refusing jurisdiction.

THIRD POINT.

The question of whether or not Eugene Van Schaick's interest in the bond passed to the plaintiff without assignment (it being conceded that, if it did not, the plaintiff's case fails on the merits), remits that whole question to a trial of the merits. Such question on the merits cannot be and ought not to be, raised before this Court on an objection to jurisdiction. It seems therefore out of place to argue here the question of whether an assignment was necessary.

Nevertheless, the plaintiff in error desires to submit certain considerations tending to show that its claim (that no assignment was necessary) is well grounded, and raises, to say the very least, a genuine and colorable contention.

An examination of the decree of the court under and in pursuance to which the bond was given, shows that the said bond was for the safe-keeping and preservation of the fund by Henry Van Schaick during his life

"to the end that at his decease the same may be paid over and distributed *per stirpes* among the descendants of the said Henry Van Schaick *and the persons to whom the said share shall then belong*" (fol. 68),

and that, at the time of the decree, one of said shares already belonged to a person who was not a descendant of Henry Van Schaick, namely, to Sarah H. Van Schaick, the wife of Eugene. The decree further provides that the bond shall run

"to the descendants now living of the said Henry Van Schaick who are parties to this action and to such other descendants of the said Henry Van Schaick as shall survive

him, and to such other persons as shall be entitled upon the death of the said Henry Van Schaick to receive any portion of the share * * * in which he has a life interest" (fol. 68).

The bond given in pursuance of this decree runs to

"Such descendants of the said Henry Van Schaick as shall be living at the time of his death to be paid to them, their executors, administrators and assigns" (fol. 16).

The "assigns" here intended are obviously persons to whom any of the descendants of Henry Van Schaick, who should survive him, should have assigned such descendant's *interest in the fund*. The obligation of the bond was not capable of assignment separately, any more than a mortgage of real property can be assigned separately from the debt which it secures.

And the condition of the bond is that the said fund

"Shall thereafter (*i. e.*, after Henry Van Schaick's death) be duly accounted for and paid to his descendants *as provided for in the decree aforementioned*" (fol. 17).

The collateral obligation of the surety named in this bond, like the direct obligation of a guarantor, is general and not special, and passes, *without assignment*, to any person to whom the principal interest that it is intended to secure shall pass.

Stillman v. Northrup, 109 N. Y. 473;

Everson v. Gove, 122 N. Y. 290;

Levy v. Cohen, 103 App. Div. (N. Y.)

The bond in this case is similar in many respects to an administrator's bond given to secure the interests of distributees in the estate of an intestate; and the obligation of a surety on such an administrator's bond passes, without any assignment, to anyone to whom a distributee has assigned a portion of his distributive interest.

Bertha Zinc & Mineral Co. v. Vaughan & others, 88 Fed. Rep. 566.

By analogy, an appeal-bond passes without assignment to an assignee of the judgment, as being a mere incident thereto.

Tompkins v. Gerry, 52 Ill. Appeals, 570; Brandt on Suretyship, Vol. 2, Section 520.

A lessee's covenant to pay rent follows the reversion; and upon any transfer of the reversion, the right to receive the rent goes with it, without assignment, as being a part and incident of the reversion.

Butt v. Ellett, 19 Wallace, 544;
Marshall v. Moseley, 21 N. Y. 280.

Respectfully submitted,

EDWIN D. WORCESTER,
Attorney and Counsel for Plaintiff-
in-Error.

WORCESTER, WILLIAMS & SAXE,
Attorneys for Plaintiff in the
District Court,
30 Broad Street, New York.



Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 431.

THE BRAINERD, SHALER & HALL
QUARRY COMPANY,
Plaintiff-in-Error,

AGAINST

WILSON B. BRICE, as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and the AMERICAN SURETY COMPANY,
Defendants-in-Error.

BRIEF FOR AMERICAN SURETY COMPANY,
DEFENDANT-IN-ERROR.

Statement.

This is a writ of error to the District Court of the United States for the Southern District of New York. The sole question involved is the jurisdiction of the District Court.

At the opening of the case each of the defendants moved on the pleadings to dismiss the complaint

"on the ground that the District Court of the United States has no jurisdiction under section

24, subdivision 1 of the Federal Code because the plaintiff in this action sues by virtue of an assignment from one Eugene Van Schaick, and the complaint shows that the said Eugene Van Schaick was a resident and citizen of the State of New York, the state of which both defendants are residents and citizens" (Record, p. 32, fol. 61).

The District Judge granted the motion and dismissed the complaint on the following ground:

"This action is brought on a surety bond made by one Henry Van Schaick, since deceased, as principal, and the defendant the American Surety Company of New York as surety, for the purpose of securing the due payment at Henry Van Schaick's death of the remainder interests in a certain fund of money held by Henry Van Schaick as life tenant. That one Eugene Van Schaick, (since deceased), was at the time of the assignment below mentioned the owner of one of the remainder interests secured by said bond; that Eugene Van Schaick, during the continuance of the life estate, assigned to the plaintiff a portion of his said remainder interest and thereafter survived the said Henry Van Schaick, and this action is based on such assignment.

That Eugene Van Schaick was in his lifetime a citizen and resident of the State of New York, and both defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this court upon said remainder interest and said bond, if no such assignment had been made" (Record, p. 42, fol. 80).

The complaint alleges that the two defendants, the American Surety Company and Brice, are both citizens and residents of New York. It was formally conceded that Eugene Van Schaick was also a citizen and a resident of New York (Record, p. 33, fol. 61).

The Facts.

The material facts as shown by the pleadings are as follows:

Jane C. Van Schaick devised to Henry Van Schaick (now deceased) for life, an undivided one-half interest in her real estate. The terms of the devise were as follows:

"An equal undivided one half part thereof to my cousin Henry Van Schaick of New York for and during his life only and the remainder in fee simple in said half part to the descendants of said Henry Van Schaick who shall be living at the time of his decease and living also at the time of my decease, if I shall survive him" (Record, p. 2, fol. 3).

The other devisees, Henry's co-tenants, instituted a partition suit, in the course of which the real estate was sold, and the interest of Henry Van Schaick and of his descendants came to be represented by cash proceeds amounting to \$67,184.87 in the hands of the Referee appointed to sell the property.

The decree of Distribution then directed that this amount should be either (1) paid into court in the usual way, to be invested for the benefit of Henry Van Schaick, the life tenant, or (2) paid to Henry Van Schaick upon his giving the usual security exacted from life tenants (fol. 68). The decree provided that such security bond "may consist of a bond of the American Surety Company", and went on to describe the provisions of the bond.

Thereupon, Henry Van Schaick, the life tenant, as principal, and the American Surety Company as surety, executed a bond for \$75,000 to such descendants of the said Henry Van Schaick as should be living at the time of his death, and their assigns.

This bond was duly approved by the Supreme Court and filed and thereupon the fund was paid by the Referee to Henry Van Schaick (Record, p. 6, fol. 11).

The bond was conditioned on the safekeeping of the fund by Henry Van Schaick, the life tenant, for the benefit of the remaindermen.

Henry Van Schaick died on November 15, 1914, leaving three children surviving him. Eugene Van Schaick was one of these children and accordingly became entitled, on the death of his father, to a one-third interest in the fund. After the giving of the bond and the payment of the fund to Henry Van Schaick and on May 7, 1901, Eugene Van Schaick assigned to the plaintiff the sum of \$20,000 to be payable out of the interest of the said Eugene Van Schaick in the fund in the hands of Henry Van Schaick, the life tenant. Eugene Van Schaick died on January 27th, 1916 (Record, p. 7, fol. 13).

The complaint then alleges that Henry Van Schaick, the life tenant, did not safely keep the principal of the fund, and it alleges a demand on his executor, the defendant Brice, and his failure to pay. Accordingly, the plaintiff brought this action against the executor of Henry Van Schaick and the American Surety Company, the bondsman, demanding judgment in the sum of \$20,000.

FIRST.

The cause of action and the only cause of action stated in the complaint is a cause of action at law on the bond against Henry Van Schaick, the principal, and American Surety Company, the surety.

This is an action at law and was brought on before a court and jury (Record, p. 32, fol. 60). The complaint first states the facts and circumstances above stated under which the court found itself in possession of the fund, and the decree of the court under which the fund might be paid to Henry Van Schaick instead of being retained and invested by the court for his benefit. Those provisions required a bond for the safekeeping of the fund as above stated. The complaint then alleges that a bond was given. The obligors of the bond were Henry Van Schaick as principal, and the American Surety Company as surety; the obligees of the bond were

"such descendants of the said Henry Van Schaick as shall be living at the time of his death . . . to be paid to them, their executors, administrators or assigns" (Record, p. 8, fol. 16).

The condition of the obligation, as stated in the bond, is as follows:

"The condition of this obligation is such that if the above bounden, Henry Van Schaick, shall, during his lifetime, safely keep and preserve the principal of said Sixty-seven thousand one hundred and eighty-four dollars and eighty seven cents (\$67,184.87), and if such sum of \$67,184.87 shall thereafter be duly accounted for and paid to his descendants as provided for in the decree aforementioned, then this obligation is to be void, else to remain in full force, virtue and effect" (Record, p. 9, fol. 17).

The complaint then alleges the assignment under which Eugene Van Schaick, the son of Henry Van Schaick, assigned to the plaintiff the principal obligation, to secure which the bond was given, viz., his right, in a portion of the fund. The complaint then alleges the death of Henry Van Schaick and the breach of the condition of the bond in the following language:

"XV. Upon information and belief, that the said Henry Van Schaick did not during his lifetime safely keep or preserve the principal of said \$67,184.87 mentioned in the condition of the said bond, Exhibit A, and that such sum of \$67,184.87 has not been accounted for and has not been paid nor has any part thereof been paid to his descendants or to the persons to whom the same belongs, as provided for in the decree mentioned in the said bond" (Record, p. 7, fol. 13).

It then alleges the usual demand and failure to pay, and demands judgment against the executor and the American Surety Company for \$20,000, with interest from the date of the death of Henry Van Schaick.

It would seem too plain for argument that this is the ordinary cause of action at law in contract on a surety bond against the principal and surety upon a breach of the condition of the bond.

But the plaintiff seems to indicate in his first point that this action is not brought on the contract obligation of the obligors in the bond, but may be brought for the recovery of property or for the interest in the property under the will of Jane Van Schaick, which was duly assigned to the plaintiff.

We admit that under the rule of *Brown v. Fletcher*, 235 U. S. 589, the vendee or assignee may bring an action to recover an interest in property, or damages for its unlawful detention without coming

within the scope of subdivision (1) of section 24 of the Judicial Code. But this is not such an action; for in such an action (being an action at law) by no possibility could the plaintiff join the American Surety Company. The basis of such an action is the right of the plaintiff to certain property under the will of Jane Van Schaick. The liability of Henry Van Schaick, or of his executor, depends on that right. The liability of the American Surety Company, if there be any, springs solely from its bond.

In like manner, it may be possible to spell out from the facts stated in the complaint a cause of action at law against Henry Van Schaick or his estate for a devastavit. But no such action exists against the American Surety Company, and the cause of action at law for a devastavit against the executor of Henry Van Schaick is wholly different from the cause of action at law against the American Surety Company on its bond. Under the Code of Civil Procedure regulating actions at law in New York, the two actions cannot be joined in one action (Code of Civil Procedure, sec. 484).

While in a proper suit in equity for a devastavit and an accounting against the estate of Henry Van Schaick it might be possible to join the sureties on his bond, in an action at law this is not permissible because the sureties would not be interested in the cause of action for a devastavit against the estate of Henry.

Nichols v. Drew, 94 N. Y. 22;

Roehr v. Liebmann, 9 App. Div. 247;

Barton v. Speis, 5 Hun 60;

People v. Equitable Life Assurance Society,
124 App. Div. 714;

Green v. Dunlop, 136 App. Div. 116.

The law is clear that, when the facts on which recovery is sought are stated in a single count, the

complainant will be confined to the cause of action which, upon a fair construction of the complaint, appears to have been the one selected.

Farmers & Merchants Natl. Bank v. Smith,
77 Fed. 129.

In that case, the court said (p. 134):

"If a plaintiff intends to demand a judgment on different grounds, he should state the facts constituting the several causes of action in separate counts, so as to advise the court and the opposite party of his intention. The Code of the State where this cause originated provides that, 'where a petition contains more than one cause of action, each shall be separately stated and numbered' . . . When this provision of the Code is disregarded, and the facts constituting a cause of action are stated in a single count it may well be concluded that the pleader intended to rely upon a single ground of recovery, and in such cases he should be confined to the cause of action which, upon a fair construction of the complaint, he appears to have selected."

The complaint states a good and sufficient cause of action at law against both of the defendants on their bond. The complaint states no other cause of action against both of the defendants. The complainant must be held to have intended the cause of action which appears upon the face of the complaint.

In any event it is clear that the rule in *Brown vs. Fletcher* (*supra*) would not apply to any cause of action against the American Surety Company. The liability of that company is solely contractual.

SECOND.

The cause of action against the American Surety Company is based on an assignment of the bond.

The bond runs:

"unto such descendants of the said Henry Van Schaick as shall be living at the time of his death . . . to be paid to them, their executors, administrators or assigns" (Record, p. 8, fol. 16).

The bond was given as security for the performance of an obligation running from Henry Van Schaick to Eugene Van Schaick, a descendant of Henry Van Schaick. Eugene Van Schaick assigned that obligation to the plaintiff. The assignment of this, the main obligation, operated as an assignment of the collateral obligation of the American Surety Company. No formal assignment of the collateral obligation is necessary.

Tate v. George, 102 U. S. 564, at page 571;
Craig v. Parkis, 40 N. Y. 181;
Stillman v. Northrup, 109 N. Y. 473.

Such an assignee, though no formal assignment has been given, holds under a derivative title, so that the defendant can urge the same offsets as he could against an assignor, had there been a formal assignment.

Barlow v. Myers, 64 N. Y. 41;
Kleeman v. Frisbie, 63 Ill. 482.

Although no formal assignment has been given, such an assignee is an assignee within subdivision (1) of section 24 of the Judicial Code.

Shoecraft v. Bloxham, 124 U. S. 730;
Plant Investment Co. v. Jacksonville, &c., Ry., 152 U. S. 71.

The case last cited came up upon appeal from a decree sustaining a demurrer on the ground of lack of jurisdiction. To encourage improvements, the State of Florida conveyed certain lands to trustees, the lands and the proceeds thereof to be held as an improvement fund. The legislature reserved the right to grant portions of the lands to railroads. The legislature granted certain of these lands to the Jacksonville, Tampa & Key West Railway Company and the trustees of the Improvement Fund passed a resolution locating these lands and entered into a contract with the railroad to convey them. The grants were subject to the proper construction, etc., of the railroad.

Later, the complainant contracted with the Jacksonville, &c., Railway to construct the southern portion of its system and was to receive as part of the consideration the land to which the defendant company was or might be entitled. The trustees refused to convey all the designated land. The court said (p. 77):

"The complainant is not, it is true, designated in the pleadings or in any formal instrument as assignee of the contract between the trustees of the Internal Improvement Fund and the defendant railway company, but the term 'assignee' in the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest. The contract under which the complainant claims, to wit, its contract with the defendant company for the construction of the road, transferred to it the beneficial interest of that company in the lands covered by its contract with the trustees and therefore brings the suit within the prohibition of Section 629 of the Revised Statutes."

THIRD.

Unless it be an assignee, the plaintiff cannot enforce the obligation of the bond.

The plaintiff, in the last point of its brief, would seem to indicate that it is in a position to enforce the contractual liability of the American Surety Company on its bond, not because it is an assignee thereof, but because it is one of the persons described in the bond. On the face of the bond there is, of course, absolutely no basis for such a contention.

The bond, as we have indicated above, runs

"unto such descendants of said Henry Van Schaick as shall be living at the time of his death . . . payable to them, their executors, administrators or assigns" (Record, p. 8, fol. 16).

Thus the descendants of Henry Van Schaick, their executors, administrators or assigns, are the only obligees nominated in the bond, and the plaintiff must therefore claim either as a descendant or an assignee of a descendant.

Similarly, the condition of the bond makes it plain that only the descendants of Henry Van Schaick, or those claiming through them, are the beneficiaries. The bond first describes the rights of these descendants in the fund; it says:

"Whereas by a decree of distribution . . . it is provided among other things that one-half of the net proceeds of such property sold in the said partition suit which one half amounts to sixty seven thousand, one hundred and eighty four dollars and eighty seven cents (\$67,184.87) is adjudged to belong to said above bounden Henry Van Schaick for and during the term of

his natural life, and that at the time of his death the said share shall pass to and vest absolutely in such of the descendants of said Henry Van Schaick as shall then be living" (Record, p. 9, fol. 16).

The condition of the bond provides that this fund "shall thereafter be duly accounted for and paid to his descendants as provided for in the decree aforementioned" (Record, p. 9, fol. 17).

It is therefore plain that the plaintiff not being one of the descendants of Henry Van Schaick, must claim, if at all, as an assignee.

But the plaintiff seems to argue that the provisions of the bond should be enlarged and modified so as to read into the bond certain provisions of the referee's report or of the decree, because, it says, the bond was given in pursuance of the terms of the decree.

The plaintiff's argument seems to be that, while the bond ran to the descendants of Henry Van Schaick or their assigns, the decree contemplated a bond which would run

"to the descendants . . . and to such other persons as shall be entitled upon the death of the said Henry Van Schaick to receive any portion of the share of the said proceeds in which he has a life interest" (Record, p. 37, fol. 68).

The decree, however, it may be said in passing, does not require but only suggests the provisions to be inserted. It states that the security "may consist" (Record, p. 37, fol. 68) of a certain kind of a bond. Whether the undertaking which the American Surety Company was willing to make measured up to the original provisions of the decree or not, is immaterial. Such as it was, it was approved by the court as sufficient (Record, p. 6, fol. 11).

But even if the decree had explicitly required a bond to be given in the terms of the decree, the obligation of the bond actually given, if clear and unambiguous, could not be enlarged.

American Exchange National Bank v. Goubert, 210 N. Y. 421.

In that case a bond was given pursuant to an order of the court. This order provided that an undertaking should be filed agreeing to indemnify and hold harmless the American Exchange National Bank

"from any and all damage, interest, cost or other expenses by reason of or growing out of the issuance or continuance of the injunction and as security for the amount of indebtedness claimed to be due to the defendant and for which it claims to hold said certificate of stock as collateral" (p. 423).

The bond as filed indemnified and held harmless the bank

"from any and all damage, interest, cost or other expenses by reason of or growing out of the issuance or continuance of the injunction as security for the amount of the indebtedness claimed to be due the defendant and for which it claims to hold a certificate of stock as collateral" (p. 424).

The Court said (p. 426):

"We are thus confronted by an order which requires an undertaking not merely to pay the damages resulting from the injunction but also to pay the debt and a bond given in assumed compliance with the order, which is confined to the payment of the damages alone. The question is, how far conditions in respect of which the bond is silent may be incorporated into it so as to conform its meaning to the requirements of the

order. That this bond was supposed to constitute a compliance with the order is not doubtful. The fact that it was made with that intent is stated in substance in its recitals. If the meaning of the bond were doubtful or ambiguous, we should have the right, in view of those recitals, to limit or to enlarge its operation accordingly (*Sonneborn v. Libbey*, 102 N. Y. 539, 550; *Elmendorf v. Lansing*, 5 Cow. 468; *Smith v. Molleson*, 148 N. Y. 241, 246). We think, however, that a court is without power to interpolate a new condition into a bond that is free from ambiguity in order to force a correspondence between the bond and the order under which it was executed. The order may be referred to for the purpose of explaining a doubtful phrase, but not for the purpose of inserting a new condition, and thus reforming the contract."

The change which the plaintiff is seeking to import into the bond does not involve a mere technicality but vitally affects the rights of the American Surety Company, for, simultaneously with the issuance of the bond, the American Surety Company obtained a full release of all obligation from Eugene Van Schaick and other descendants of Henry Van Schaick (see Answer, Second Defense, p. 18, fol. 34, Exhibit A, p. 24), and it also obtained within a few days a bond of indemnity signed by Eugene Van Schaick and other descendants of Henry Van Schaick indemnifying the American Surety Company from all liability under the bond (see Answer, Third Defense, p. 18, Exhibit B, p. 25). Thus, the American Surety Company was willing to enter into its covenant with the descendants of Henry Van Schaick only on the footing that its liability to Eugene Van Schaick and his assigns should be extinguished. In effect, what the American Surety Company did was to enter into a contract which limited its liability to the grandchildren while the immediate children of Henry Van Schaick,

being of age, were willing to waive all security because they trusted their father's integrity. It would entirely change the contract if the persons to whom the children assigned their interest in the estate could claim the security, not under a derivative title, but as original promisees of the American Surety Company so that all equities between that Company and the assignors should be barred.

FOURTH.

As the court below did not have jurisdiction of the only cause of action stated in the complaint, the dismissal of the complaint for lack of jurisdiction was proper.

But as we understand it, the plaintiff argues that the question whether it is entitled to sue, not as an assignee but as a person described in the bond, should have been tried on the merits, the court assuming jurisdiction, and then dismissing the complaint on the merits if the contention of the plaintiff were not well founded.

The difficulty with this argument is that (if we are right in our contention) the pleading stated a good cause of action under which the plaintiff sued the American Surety Company as assignee, whether under an express or implied assignment. It stated no other cause of action. The court was without jurisdiction to assume that cause of action. It was therefore bound to dismiss the complaint for lack of jurisdiction.

Manifestly the court must have power to determine the nature of the action as a basis for its decision as to jurisdiction. Otherwise the court would in every case be concluded by the mere as-

servation of the plaintiff that the pleading contained a cause of action of which the court would have jurisdiction.

Defiance Water Co. vs. Defiance, 191 U. S. 184;

Underground R. R. Co. vs. City of N. Y., 193 U. S. 416;

Shoecraft v. Bloxham, 124 U. S. 730.

In *Shoecraft vs. Bloxham* the Court said (p. 736):

"If he has no interest in the contract, he has no standing in court to ask its enforcement, and if he is to be regarded as an assignee of the contract under the deed of trust, he is disabled from maintaining the suit in the Circuit court by section 629 of the Revised Statutes."

Respectfully submitted,

BRONSON WINTHROP,
Counsel for American Surety Company,
Defendant in Error.

WINTHROP & STIMSON,
Attorneys for Defendant
American Surety Company,
in the District Court,
32 Liberty Street,
New York City.

BRAINERD, SHALER & HALL QUARRY COMPANY
v. BRICE, AS SOLE SURVIVING EXECUTOR OF
VAN SCHAICK, ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

No. 431. Submitted March 17, 1919.—Decided June 2, 1919.

The allegations of the complaint determine the character of an action for the purpose of testing the jurisdiction of the District Court to entertain it. P. 231.

The life tenant of a fund, to secure the remaindermen, executed, with surety, a bond running to them, their executors, administrators and assigns, and conditioned for the preservation of the fund by him and payment to them upon his death. One of them assigned part of his remainder interest to a third person, who, after the death of the life tenant, brought an action on the bond against the life tenant's executor and the surety jointly, to recover in the amount of the assigned remainder interest. *Held*, that the assignment of the remainder interest carried with it *pro tanto* the obligation of the bond; and that the action was one prosecuted by an assignee to recover on a chose in action, not cognizable by the District Court, where the assignor and the defendants were citizens of the same State. Jud. Code, § 24. P. 233. *Brown v. Fletcher*, 235 U. S. 589, distinguished.

Affirmed.

Opinion of the Court.

250 U. S.

THE case is stated in the opinion.

Mr. Edwin D. Worcester for plaintiff in error.

Mr. Bronson Winthrop for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

The Quarry Company brought an action at law in the District Court of the United States for the Southern District of New York to recover \$20,000 and interest from Wilson B. Brice as executor of Henry Van Schaick, deceased, and the American Surety Company. Answers were filed and the case was at issue, and came on for trial, when, upon motion of the defendants, the action was dismissed for want of jurisdiction. The only question here concerns the correctness of this ruling of the District Court. The ground of the dismissal is thus stated in the record:

"In this cause, I hereby certify that this writ of error is allowed solely, and that the order herein dismissing the complaint was based solely, on the ground that no jurisdiction of the District Court existed; that this question has been determined by me on the following grounds:

"This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the continuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said

Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the State of New York and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made."

Section 24 of the Judicial Code, among other things, provides:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

To determine the character of the action for the purposes of jurisdiction recourse must be had to the allegations of the complaint. They are quite voluminous, but for our purposes may be summed up as stating: The plaintiff is a corporation of the State of Connecticut, the defendant, the American Surety Company, is a corporation of the State of New York. The defendant, Wilson B. Brice, is a resident and citizen of the State of New York. (It was conceded for the purposes of the motion that Eugene Van Schaick was a citizen of New York.) Jane C. Van Schaick died May 20, 1893, seized of certain real estate in the State of New York. By her last will and testament she gave one-half of her real estate to Henry Van Schaick of New York during his life, with remainder to his descendants who should be living at the time of his decease and living also at the time of the testatrix' decease, if she should survive him. The will was duly probated on June 28, 1893. Henry Van Schaick survived the testatrix, and had living children, one of whom was Eugene

Van Schaick. The complaint then recites certain conveyances, and the prosecution of a partition suit, the decree in which was, by order of the court, considered upon the motion to dismiss. In that suit it was adjudged that Henry Van Schaick had an estate as tenant for life in one-half of the said real estate, that among others Sarah Van Schaick, wife of Eugene Van Schaick, had an estate in remainder in the land to commence in possession upon the death of Henry Van Schaick. It being found that the land could not be divided, it was ordered sold. The sale for \$134,369.74 is recited. One-half of the proceeds \$67,184.87, was found to belong to Henry Van Schaick for life, at his death to vest in such descendants of Henry Van Schaick as should be then living, or in such persons as should then be the legal owners of said shares. The decree provided that the fund might be paid to Henry Van Schaick upon his giving security to the remaindermen, and provision was made for giving the bond now sued upon. Henry Van Schaick as principal and the American Surety Company then executed the bond in the sum of \$75,000. The obligees of the bond were the descendants of Henry Van Schaick living at the time of his death, the amount to be paid to them, their executors, administrators or assigns. The condition of the bond was that Henry Van Schaick during his lifetime should safely keep and preserve said principal sum, and the same should be paid over to his descendants as provided in the decree. Eugene Van Schaick acquired the interest which had been assigned to his wife. On May 9, 1901, Eugene Van Schaick assigned to the Quarry Company the sum of \$20,000, to be paid out of his remainder interest. Henry Van Schaick died on November 15, 1914, leaving Eugene Van Schaick and others surviving him. Eugene Van Schaick died on January 27, 1916. Henry Van Schaick did not keep and preserve the principal of said \$67,184.87, the same was not paid as provided in the decree, but was lost by said Henry

Van Schaick. The complaint avers demand of the \$20,000 and interest, and prays judgment against the defendants.

The action thus appears to have been brought upon the assignment of Eugene Van Schaick, a citizen of New York, to the plaintiff, a corporation of Connecticut, against defendants, who were residents and citizens of New York. Eugene Van Schaick could not have maintained the suit in the federal court, being himself a citizen and resident of New York. This suit was an action at law upon the bond. It was against both the executor and the surety company. The surety company was liable at law only upon the bond. The complaint, fairly considered, shows that such was the real nature of the suit. It contained but a single cause of action, and prayed for joint judgment against the executor of Henry Van Schaick and the surety company. Henry Van Schaick was liable to Eugene Van Schaick upon the bond. Eugene Van Schaick assigned that obligation to the plaintiff to the extent of \$20,000. That assignment carried with it the obligation of the surety company given to secure the faithful performance of the duty required of Henry Van Schaick. *George v. Tate*, 102 U. S. 564, 571.

The defenses, if any, of the surety company against the claim in the hands of Eugene Van Schaick could have been urged against the plaintiff. We think the plaintiff was an assignee within the meaning of § 24, without formal assignment of the bond. *Shoecraft v. Bloxham*, 124 U. S. 730; *Plant Investment Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 152 U. S. 71.

Brown v. Fletcher, 235 U. S. 589, is an entirely different suit from the one now under consideration. In that action there was an assignment of an interest in a trust estate by the beneficiary, who was a resident and citizen of New York, to the complainants who were residents and citizens of Pennsylvania, and suit was brought in the District Court of the United States for the Southern District of

2
3
3

New York, the defendants being residents and citizens of New York. It was held that the suit to recover this interest in a trust estate was not a suit by an assignee within the meaning of § 24 of the Judicial Code. That suit, this court held, was not a suit upon a chose in action, but was one to recover upon the conveyance of an alienable interest acquired from the owner in a trust estate. Such interests might be sued for in the federal courts when the requisite amount and diversity of citizenship exist. 235 U. S. 598, 599. But here the case is different; the suit was upon the bond, the right to recover arising from the assignment of the interest of Eugene Van Schaick in the fund in the hands of Henry Van Schaick. It was not a suit to recover the interest of Eugene Van Schaick in the estate because of the wrongful conversion thereof by Henry Van Schaick. To such a suit the surety company would not be a proper party. It was, as we have stated, an action upon a single cause of action against the executor of the principal and the surety upon the contract evidenced by the bond. The right to such action was derived by assignment from Eugene Van Schaick, a citizen and resident of New York, and, as he could not have sued in the federal court, his assignee, the plaintiff, could not by reason of § 24 of the Judicial Code.

Affirmed.